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NO.

Supreme Court, U.S.

FILED

JUN 30 1988

JOSEPH R. SPANOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN CAMPBELL, JR.,
ARTHUR KEIGNEY,
and STEPHEN DOHERTY,

Petitioners

v.

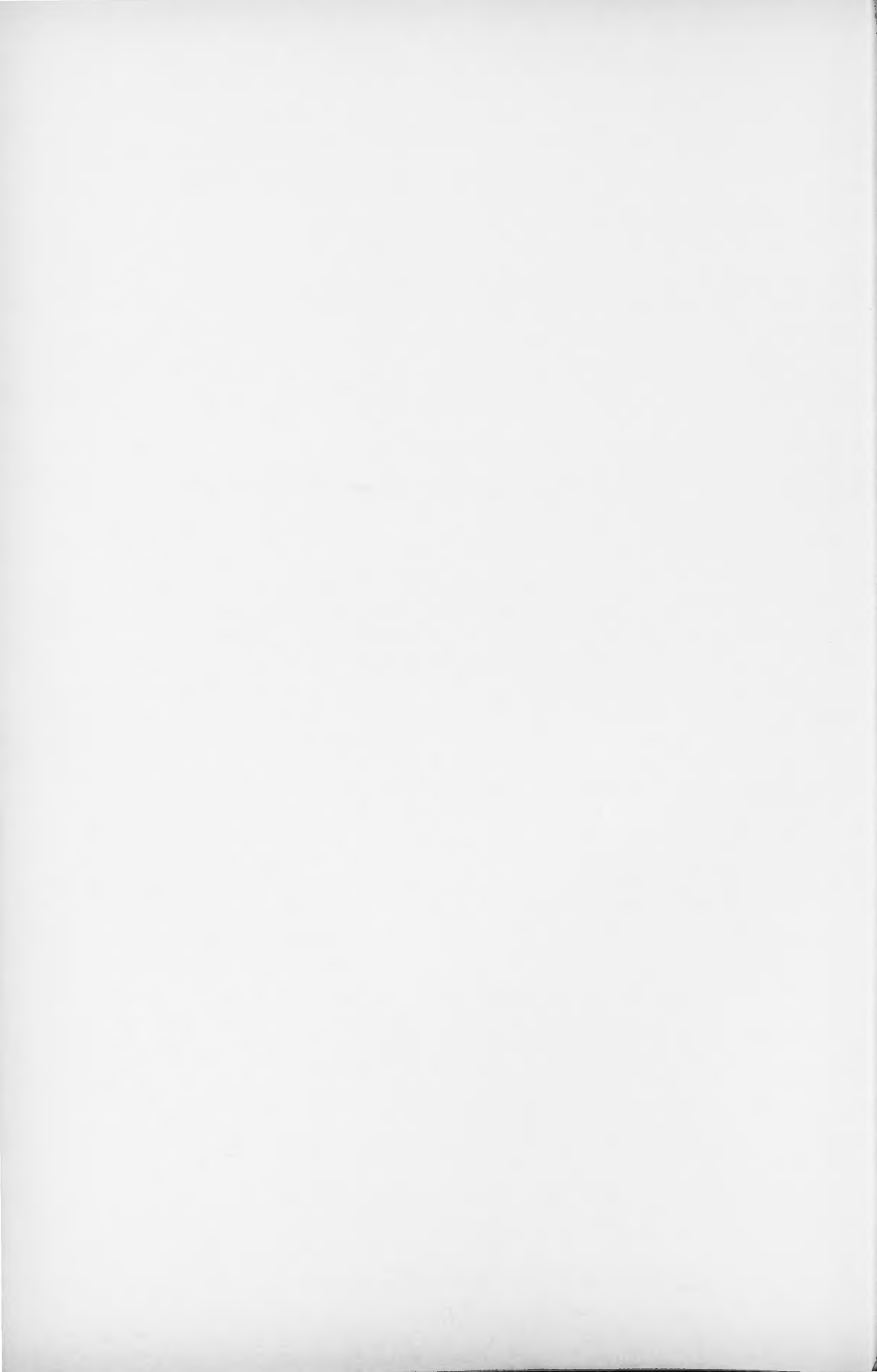
MICHAEL V. FAIR,
COMMISSIONER OF CORRECTION,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should the holding in Giglio v. United States, 405 U.S. 150 (1972), - that the duty to disclose critical impeachment evidence within the possession of a prosecutor's office does not turn on the good or bad faith of the individual prosecutor involved - be overruled?
2. Can reasonable speculation be equated with proof beyond a reasonable doubt so that it was appropriate to find that petitioner Doherty was a joint venturer?



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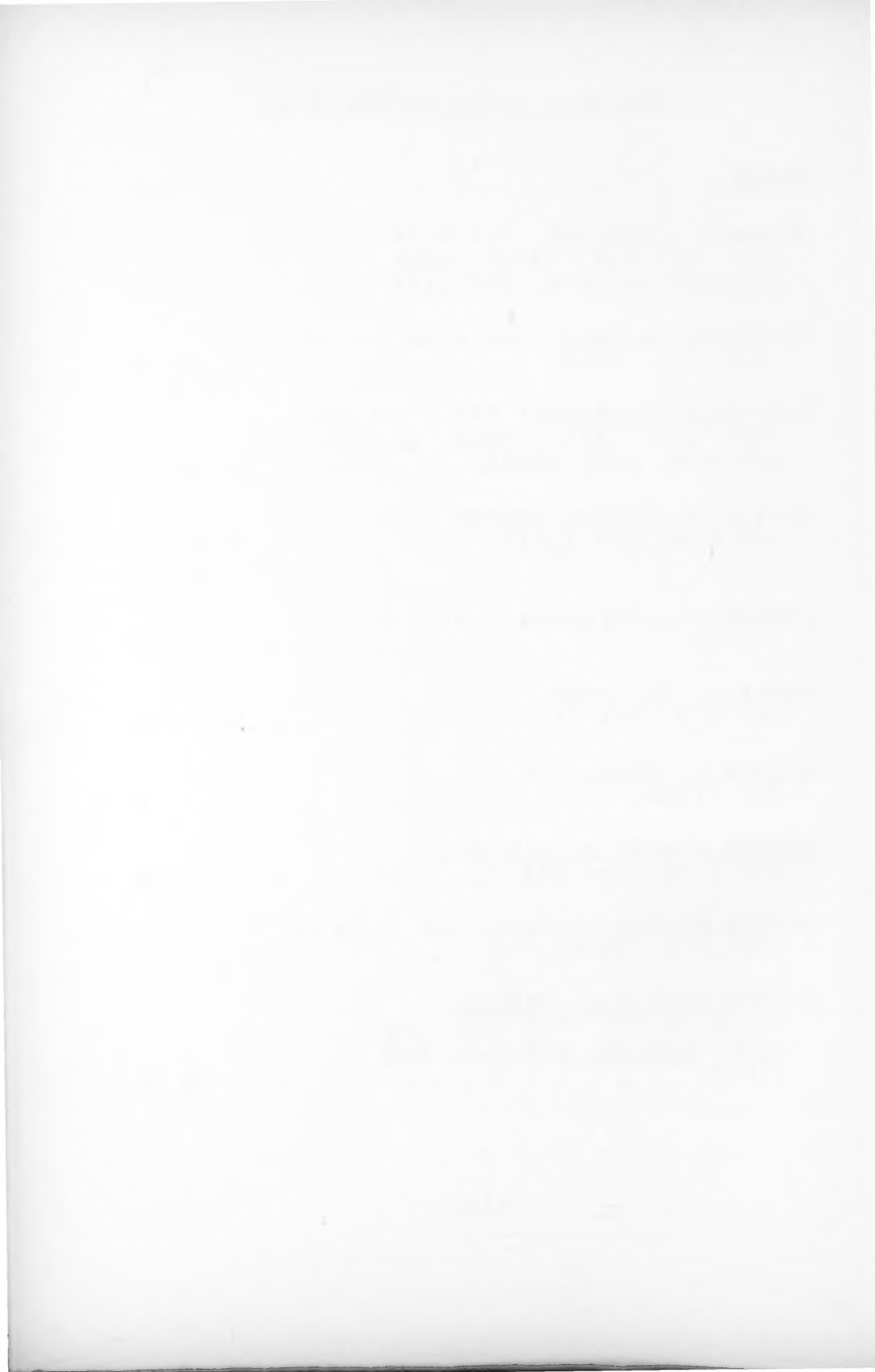
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Petitioners John Campbell, Jr., Arthur Keigney and Stephen Doherty pray that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on January 26, 1988.



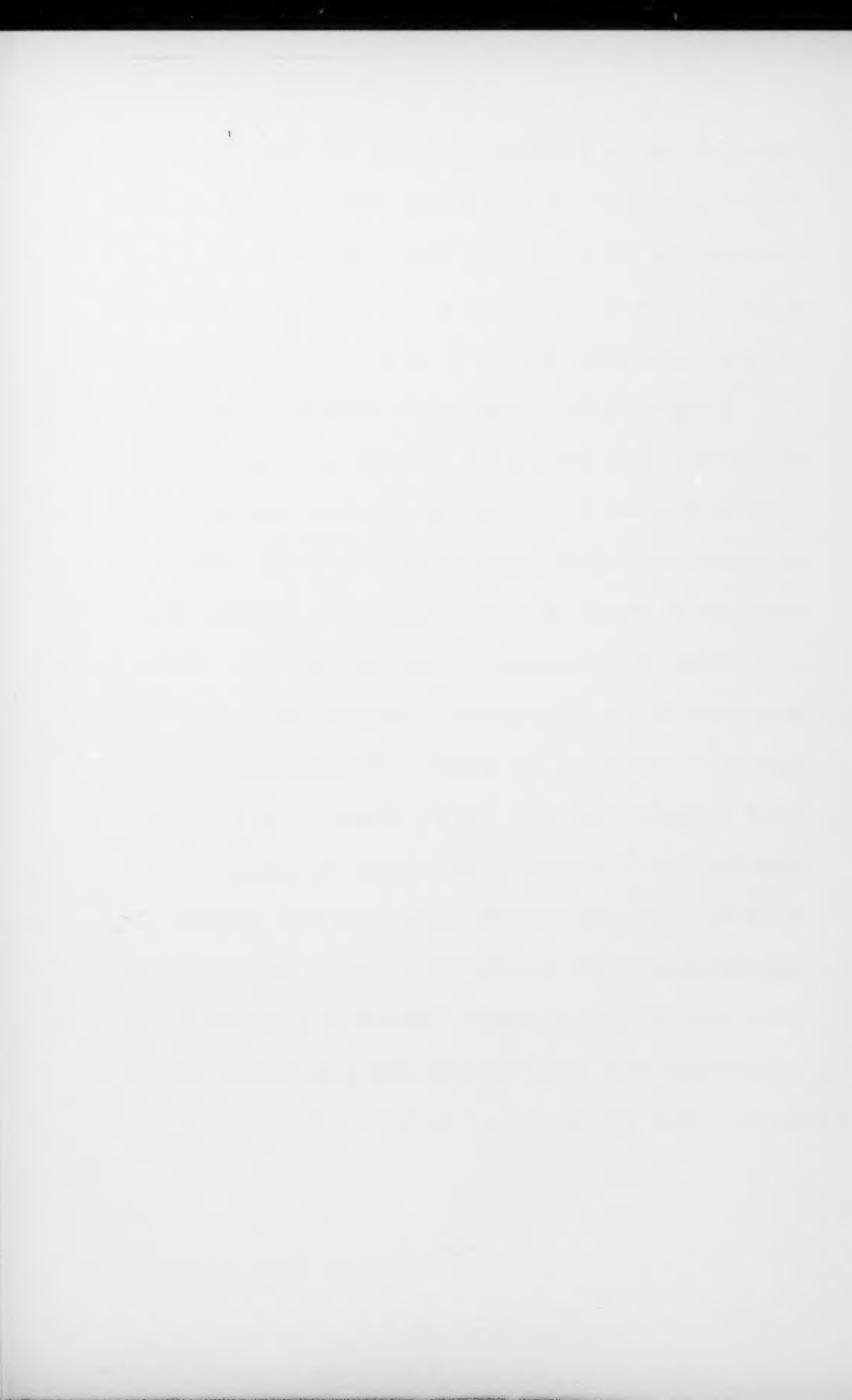
Opinions Below

Campbell, Keigney and Doherty were tried in Norfolk County, Massachusetts before a jury and the Honorable Judge Keating from November 14-23, 1977, and, the jury returned first degree murder verdicts against them. Their convictions were affirmed by the Supreme Judicial Court. Commonwealth v. Campbell, 378 Mass. 680, 393 N.E.2d 820 (1979), reproduced herein in the Appendix at A-1 to A-59. The Petitioners filed a motion for new trial which was heard before Judge Keating on November 18, 1984. After an evidentiary hearing Judge Keating issued Findings of Fact and Rulings of Law denying the motion. Said Findings are reproduced herein in the Appendix at A-60 to A-70. The petitioners pursuant to state procedural requirements sought leave to appeal from the denial of their motion. On September 12, 1985 the Honorable Justice Wilkens, in his



capacity as a Single Justice of the Supreme Judicial Court of Massachusetts issued a Memorandum of Decision denying leave to appeal. Said Memorandum is reproduced herein in the Appendix at A-71 to A-81.

Subsequently the petitioners filed petitions for writs of habeas corpus in the United States District Court for the District of Massachusetts. On March 5, 1987, the Honorable Judge Mazzone issued a Memorandum and Order dismissing their petitions. Said Memorandum is reproduced herein in the Appendix at A-82 to A-99. On January 26, 1988 a panel of the First Circuit affirmed the District Court. Campbell v. Fair, 838 F.2d 1 (1st Cir. 1988), reproduced herein in the Appendix at A-100 to A-119. On March 31, 1988 the First Circuit denied a petition for rehearing and suggestion for rehearing en banc. See Appendix at A-121.



Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on January 26, 1988. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 31, 1988.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provision Involved

Section One of the Fourteenth Amendment provides in relevant part:

. . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

The United States District Court for the District of Massachusetts had jurisdiction to consider petitioners' habeas corpus petitions pursuant to 28 U.S.C. §2254.



A. Expectations of Leniency

Robert Perrotta was mutilated and murdered on November 25, 1976 at MCI Walpole. On December 1, 1976 Thomas Carden began cooperating with the Norfolk County District Attorney's Office as a witness to that murder.¹ See Tr. 4:115; 5:59. The assistant handling the case was John Prescott.²

At the time Carden began his cooperation he was serving a 20 to 30 year sentence imposed in Norfolk Superior Court on April 23, 1975 for a masked armed robbery that occurred on October 31, 1974.³ See Tr. 5:64-65. He was also serving a concurrent federal

¹Because of the "presumption of correctness" issue concerning state court factual findings, the statement of facts here will carefully delineate between disputed and undisputed facts, and will point out state court factual resolutions of disputed facts. See Sumner v. Mata, 449 U.S. 539 (1981).

²Carden met with Prescott 10-15 times. Tr. 4:119.

³Parole eligibility was in 1988. See Tr. 7:122.

sentence of 20 years for bank robbery.⁴ See Tr. 5:74-75. Carden had only two pending indictments, both in Suffolk County, for armed robbery and escape. In addition, Carden's trial counsel in the Norfolk case had timely filed a motion to revise and revoke his 20 to 30 year sentence, and served a copy on the Norfolk County District Attorney's Office; and, that motion was pending.⁵ Carden's counsel had informed him of the filing of the motion.⁶ See Sullivan

⁴Parole eligibility was on June 22, 1981. See Motion to Correct Mittimus.

⁵The Assistant District Attorney for Norfolk County handling the matter when Carden pled guilty to the Norfolk case was R. Victor Wade. See H. Tr. 67. A copy of the motion to revise and revoke was served on him. See H. Tr. 69-70.

⁶The motion was filed on or about April 28, 1975. Judge Keating found, based on Prescott's testimony, which he apparently credited in full, that Prescott did not learn that there had been a pending motion to revise and revoke until after the petitioners' trial. Prescott had obviously not informed petitioners' trial counsel of the pendency of the motion. Petitioners'



Stipulation.

Based on Carden's grand jury testimony the petitioners were indicted for Perrotta's murder on February 3, 1977. On February 18, 1977 Carden pled guilty to the armed robbery and escape charges in Suffolk County. The assistant handling the matter, despite Carden's extensive criminal record for serious felonies, made no recommendation by agreement; and, Carden received a 7 to 8 year concurrent sentence on the armed robbery indictment.⁷ See Offer to Change Plea

trial counsel did not know at the time of trial of the pendency of Carden's motion. See H. Tr. 45, 52, 89.

⁷The escape indictment was filed. Parole eligibility on this sentence was after service of 56 months (2/3 of the minimum term of years), and thus no later than October of 1981. This was some "coincidence" since it turned out that 1981 would be Carden's target year for parole on the federal and state charges. See Motion to Correct Mittimus. The petitioners assert that the Suffolk Judge's question to Carden's lawyer about whether the 7 to 8 year concurrent sentence would interfere can only be viewed as an indication that he knew that something was

Transcript, 2/18/77.

Prosecutor Prescott learned that the Suffolk County charges were disposed of well prior to trial, but never disclosed that fact to the petitioners' trial counsel.⁸ See H. Tr. 124-125. The probation record of Carden that Prescott had provided the petitioners' trial counsel indicated that the Suffolk case was pending.⁹ H. Tr. 108-109.

going to be done for Carden. No experienced Superior Court Judge could believe that a short concurrent sentence was going to interfere with a longer sentence recently imposed.

⁸Prescott at the time of the hearing on the new trial motion could not remember whether he had discussed the Suffolk case with the Suffolk prosecutor or Carden's defense counsel in that case. See H. Tr. 121-123. The petitioners' trial counsel did not know at the time of trial that Carden had pled guilty. See H. Tr. 45-46, 52, 90.

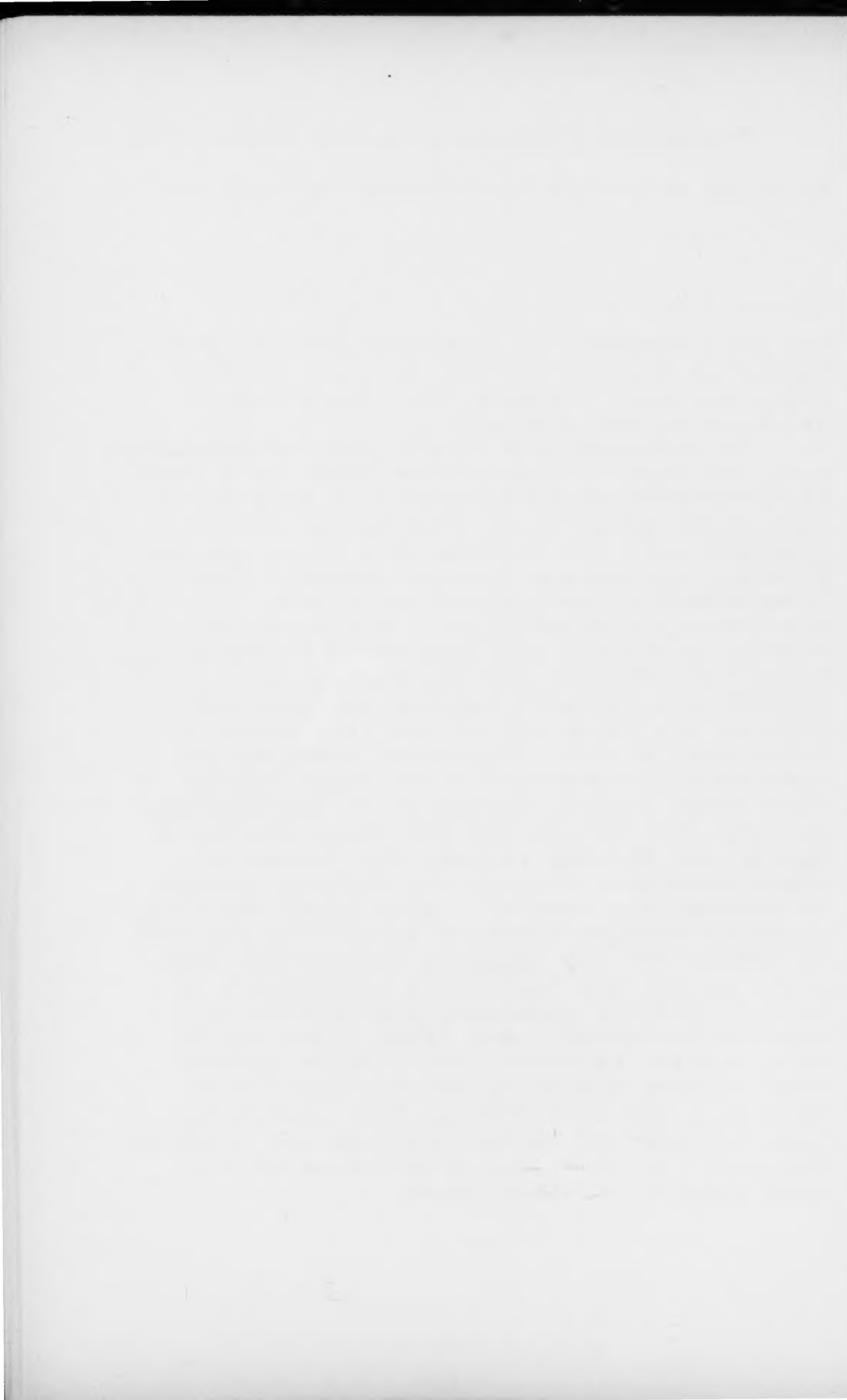
⁹The Single Justice of the Supreme Judicial Court in his Memorandum of Decision said that it wasn't clear whether the probation record before him, which showed Carden's Suffolk plea, was the one given to defense counsel at trial. If this was a finding, it is clearly erroneous. Prescott testified that the probation record he provided did not show that the Suffolk cases



Prosecutor Prescott promised Carden that he would stay with him whether Delahunt did

had been disposed of, and each defense lawyer testified that he did not know the Suffolk cases had been disposed of. There was no evidence to the contrary.

In addition, the Single Justice suggests that the fact of disposition could have been discovered by cross-examination; however, when cross-examined on this matter Carden lied and said the charges were still pending. Finally, the Single Justice suggests that independent investigation could have disclosed the disposition. During trial, Doherty's counsel had subpoenaed Carden's Salem jail records for the purpose of determining Carden's various destinations when he was taken out of the jail prior to trial (Tr. 5:10). Prosecutor Prescott had specifically asked the trial judge not to make these records available to the defense counsel (Tr. 5:7,8) and the judge thereupon denied the defense request for access to these records. Counsel for Keigney, joined by counsel for Campbell, then asked the trial judge to examine Carden's Salem jail records in camera for any possible information that might in any way tend to be exculpatory or tend to reflect promises, inducements or rewards to Carden. The trial judge denied this request as well. Had defense counsel been allowed access to these records they very well may have learned that Carden had been transported to Suffolk Superior Court on February 18, 1977, for disposition of his last pending criminal cases.



or not.¹⁰ H. Tr. 123.

On November 17-18, 1977 Carden testified against the petitioners at their trial. Carden was the Commonwealth's key witness, and the only witness to implicate the petitioners. On November 23, 1977 the jury returned guilty verdicts. On December 23, 1977 Carden's motion to revise and revoke his Norfolk sentence was heard. Prescott appeared for the Commonwealth and urged the Superior Court Judge to reduce Carden's sentence of 20 to 30 years, to 9 to 10 years; and, the judge did so.¹¹ Motion to Revise

¹⁰This testimony was uncontradicted. At that time Mr. Delahunt was the District Attorney for Norfolk County. Counsel for all the defendants filed motions for exculpatory evidence, and two of the defendants filed additional motions specifying promises, rewards and inducements. These motions were all allowed prior to trial. See Tr. 4/29/77: 20, 35, 39, 49, 50. Prescott never disclosed this promise, the Suffolk disposition, nor any other promise he may have made to Carden.

¹¹Judge Keating found, based on Prescott's testimony, that no promises were made to Carden in this regard.

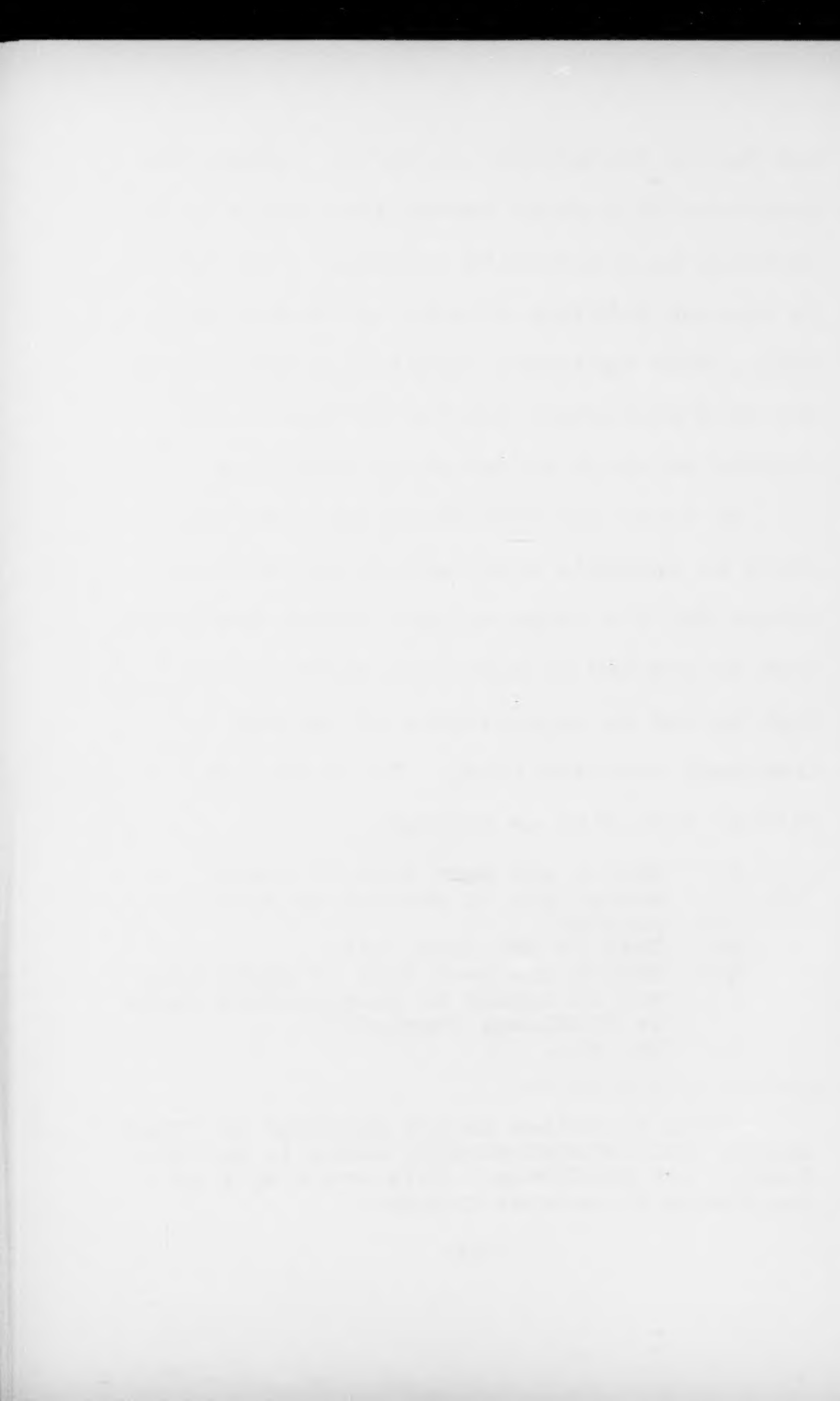


and Revoke Transcript, 12/23/77. Later, the Commonwealth further agreed that the 9 to 10 sentence be a forthwith sentence. See Motion to Correct Mittimus allowed on January 8, 1981. This agreement resulted in the wiping out of a previously imposed sentence to MCI Concord on which Carden still owed time.

At trial the defendants explored the issue of Carden's expectations of leniency in return for his cooperation. Carden testified that no one had promised him anything and that he had no expectations of favored treatment for testifying. Tr. 5:54. He further testified as follows:

- Q. Hadn't you been told it would assist you in getting on early parole?
- A. That is not true, sir.
- Q. Hadn't you been told it might help you in regard to your pending cases in Middlesex County?¹²
- A. No, sir.

¹²The probation record provided to trial counsel only showed pending cases in Suffolk County, not Middlesex. This was a slip of the tongue by defense counsel.



Q. You do have some pending open cases in Middlesex County on which you have not been sentenced, don't you?

A. I have a pending case, yes.

Tr. 5:60-61.

In closing, the prosecutor addressed the leniency motive.

"Also, as was referred to in the testimony and as commented on by my brothers, there is a 1988 parole eligibility date. I don't think there is one of us who knows what parole eligibility is but I ask you folks to really consider that aspect. Whatever Carden's motivation might be, I ask you to consider whether there is any evidence whatever of any arrangement concerning any parole eligibility date that he may have." Tr. 7:105.

* * * * *

"And remember one other thing, ladies and gentlemen. Carden was asked a question right at the end of his examination. He was asked about another murder. Bobby Perrotta saw that murder. Do you remember the answer. And Bobby Perrotta is dead. Who is next?

Folks, if you want a motive for Tommy Carden, you heard it. Parole eligibility, 1988. Never mind Ireland. Never mind Arizona.¹³ He is twenty-three and half hours a day in lockup now

¹³This was a reference to the defense presentation. See Tr. 7:41-42; Commonwealth v. Campbell, supra, 378 Mass at 655; A-10.

-- you heard that -- in a county jail. If you want a motive, I suggest it is right there." Tr. 7:122.

B. The Evidence Against Petitioner Doherty

The Supreme Judicial Court described the evidence against the two alleged principals, petitioners Keigney and Campbell, as "somewhat thin" and conceded that the evidence against petitioner Doherty presented an even "closer question."¹⁴ Commonwealth v. Campbell, supra, 378 Mass at 688; A-16-18.

Perrotta died of asphyxiation due to

¹⁴Both the trial court's and jury's assessment of the evidence was seriously compromised because the trial court mistakenly believed that there had been evidence at trial of a meeting between the three petitioners prior to Perrotta's murder. He expressed this belief at the hearing on the petitioners' motions for not guilty verdicts at the close of the Commonwealth's evidence and in his instructions to the jury. See Tr. 6:57-58; 7:156. This erroneous belief was obviously extremely prejudicial to petitioner Doherty. In addition, the Commonwealth continued to press this misconception in its Brief to the First Circuit.

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strangulation by ligature.¹⁵ Tr. 6:37. His death occurred within two hours of the time his body was examined by Dr. Shenker around 9:00 p.m. on November 25, 1976. Tr. 6:6-8.

Perrotta, the three petitioners, and Thomas Carden were inmates in Block A-2 at MCI Walpole. Tr. 3:12-14. There were 72 inmates in the Block, which had 3 tiers with 12 cells on each side of each tier. Tr. 3:12, 21. As you entered the Block there was a stairway on the right, and a second stairway on the same side further into the Block. Tr. 3:22. Perrotta's cell was the second cell in on the left side of the third tier. Tr. 4:64.

Perrotta was in Carden's cell from about 4:30 to 4:45 p.m. Tr. 4:72. Perrotta left in response to a call by someone, and when he returned 3-4 minutes later he was nervous.

¹⁵The evidence is here stated in the light most favorable to the prosecution. See Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Tr. 4:72-74. Perrotta and Carden spoke, and then Perrotta left. Tr. 4:75-76. Carden proceeded up the rear staircase to the third tier a few minutes later. Tr. 4:75-76.

Carden described what happened next as follows:

- Q. And would you otherwise describe this meeting with Mr. Doherty? Tell the Court and jury just what happened.
- A. Well, I got to the third tier and I was proceeding down to Bobby's room and Stephen Doherty stopped me by putting his hand on my shoulder. He started a conversation and wanted to know if I wanted to buy some grass or something like that. He sort of held me up for a long while and he was talking in a very loud voice. And then approximately three or four minutes went by
- Q. And can you describe the position of Mr. Doherty with respect to you? Can you describe his position in reference to your position?
- A. Yes, sir. He was right in front of me.
- Q. Right in front of you?
- A. Yes.
- Q. Did you make any effort to get by him?
- A. Yes, sir, I did.
- Q. What effort did you make?
- A. I tried to pass him but he kept his hand on my shoulder.
- Q. Did you have occasion to see Mr.



Doherty turn away from you at any time?

A. Yes, I did.

Q. And what happened then?

A. That is when Bobby's door opened.

Q. And what did you observe?

A. I seen Arthur Keigney walk out and then I seen Bobby Perrotta walk out and then I seen Jackie Campbell walk out.

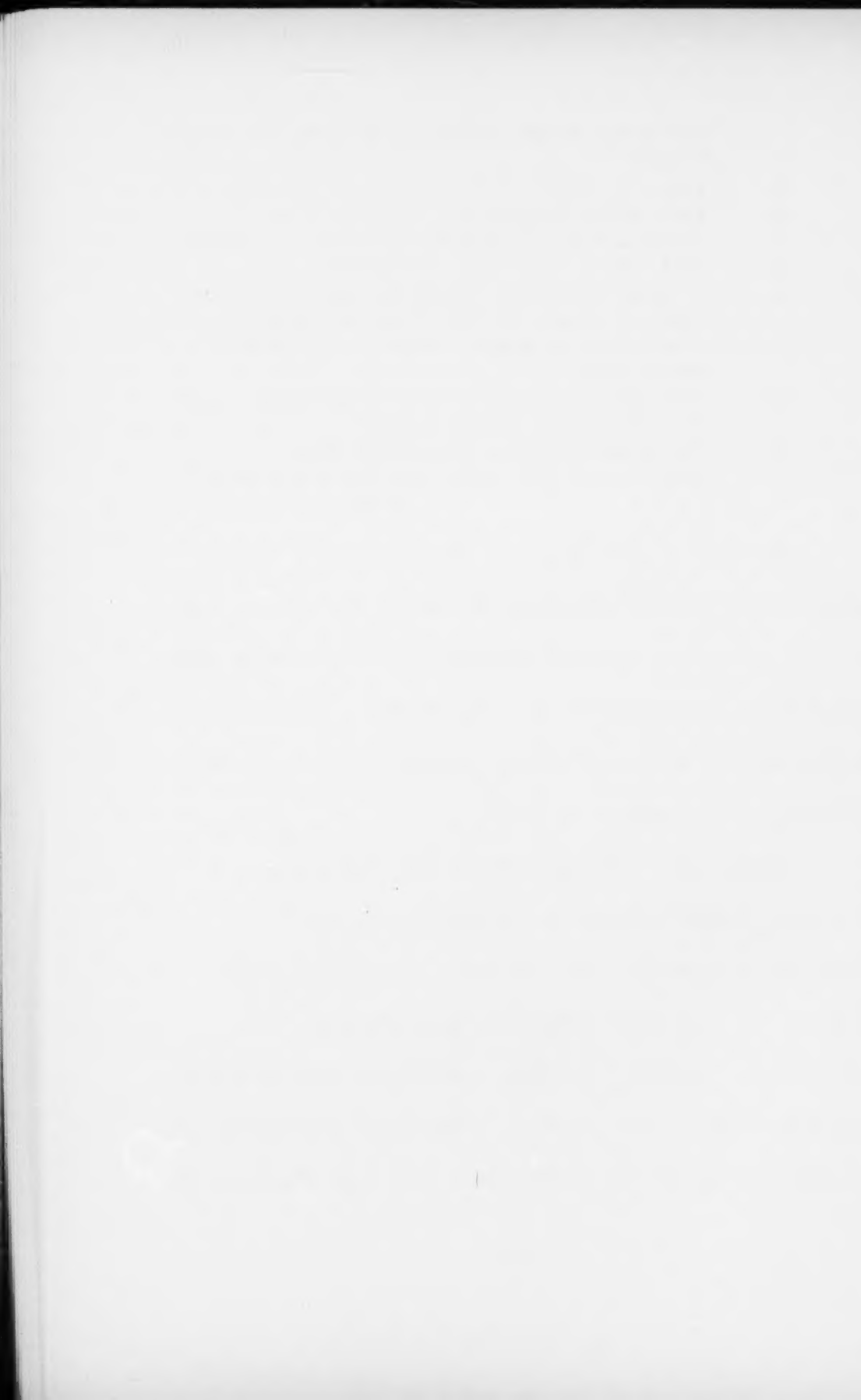
Q. And what about Doherty? Did he do anything at that time?

A. He immediately stopped the conversation and let me proceed.

Tr. 4:82-84

At the time Doherty stopped him there were many other inmates hanging around. Tr. 5:37, 40-41. Carden spoke with Perrotta who appeared very nervous. Tr. 4:85. Shortly afterward, a guard announced the 5:00 p.m. lockup and count.

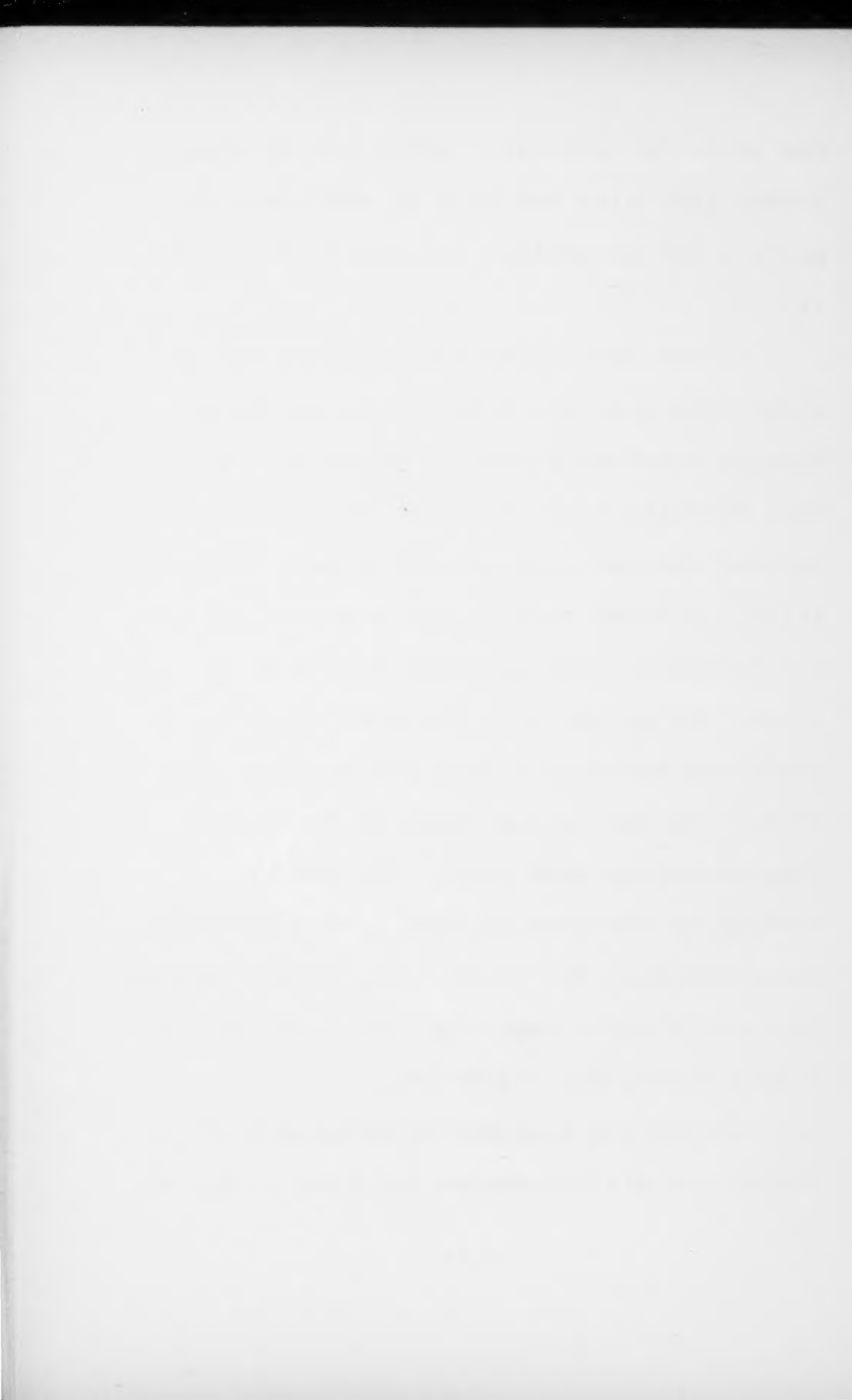
When the lockup ended at 6:00 p.m., Carden immediately went upstairs to Perrotta's cell. Tr. 4:90. Perrotta was lying on the bed wearing headphones. Tr. 4:91-92. Later, Carden returned and knocked on the door. Tr. 4:95. Perrotta released an interior locking mechanism and let Carden in



the cell. Tr. 4:95-96. After ten minutes, Carden left with two bags of marihuana to place a bet in another cellblock. Tr. 4:96, 98.

Carden was logged out of Block A-2 at about 7:18 p.m. Tr. 3:126. Officer Peter McGuire received a call at about 7:20 p.m. that Perrotta had a visitor. Tr. 3:128. He shouted for Perrotta several times. Tr. 3:128. Officer McGuire got a second call on the Perrotta visit at about 7:30 p.m. Tr. 3:129. He walked to a position where he could see Perrotta's cell and shouted. Tr. 3:161. He saw no one there at first, but then an inmate came along. Tr. 3:161. McGuire at one time thought that inmate was Joseph Yandle. Tr. 3:164. The inmate entered Perrotta's cell, came out, and said Perrotta wasn't there. Tr. 3:129-130.

On hearing a second announcement of Perrotta's visitor Carden returned to Block



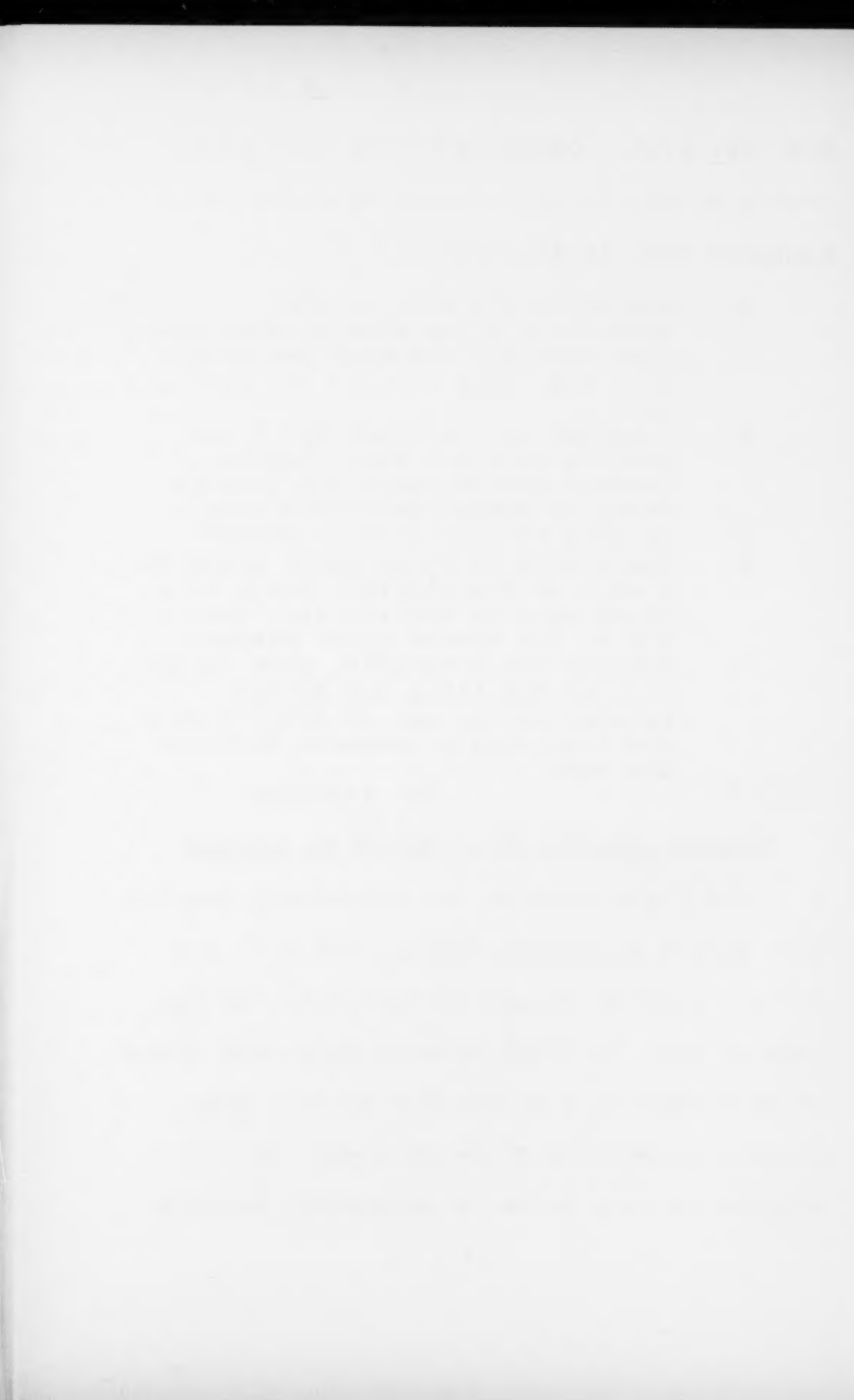
A-2. Tr. 4:99. Carden got back just after 7:30 p.m. Tr. 3:131. Carden described what happened next as follows:

- Q. And would you tell us what observations you made at that time, just what you did when you went into A-2, what you did and what you saw?
- A. I walked in the block and I was looking up and I seen Stephen Doherty leaning over the tier in front of Bobby Perrotta's room.
- Q. Is this to your left or right?
- A. The stairs is on my right going in. I went up the stairs. There is a blind spot in the stairs. When I got to the second tier, Stephen Doherty was proceeding down to the back of the block and Arthur Keigney walked out of Bobby's room and then Jackie Campbell followed him out.

Tr. 4:99-100.

Reasons Why The Writ Should Be Granted

1. The First Circuit has apparently decided that Giglio v. United States, 405 U.S. 150 (1972), need no longer be followed. In the case at bar the First Circuit held that there is no burden on a prosecutor to turn over clearly impeaching evidence about his key witness as long as he is personally unaware



of it, even when the District Attorney's Office for which he works is in possession of the impeaching evidence long before trial. The First Circuit justifies this holding because of its reluctance to place too great a burden on the prosecution of discovering what its witnesses are up to -the very justification emphatically rejected by this Court in the Giglio case.

2. In this case the First Circuit substituted reasonable speculation for proof beyond a reasonable doubt in applying the analysis required by Jackson v. Virginia, 443 U.S. 307 (1979). This case undermines the proof beyond a reasonable doubt standard and stands in stark contrast to the holdings of the Sixth and Eighth Circuits in similar circumstances. See Fuller v. Anderson, 662 F.2d 420 (6th Cir. 1981), cert. denied, 455 U.S. 1028 (1982); United States v. Wilson,



665 F.2d 825 (8th Cir. 1981), cert. denied,
456 U.S. 994 (1982).

ARGUMENT

- I. THE PETITIONERS' FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED SINCE THE PROSECUTOR AT THEIR STATE COURT TRIAL FAILED TO DISCLOSE CRITICAL IMPEACHMENT MATERIAL ABOUT THE KEY WITNESS, FAILED TO CORRECT THAT WITNESS'S PERJURY, AND PERMITTED A COMPLETELY FALSE PICTURE OF THAT WITNESS TO BE PRESENTED TO THE JURY.

Carden presented himself to the jury as someone who (1) had been promised nothing, (2) had received nothing, (3) had no expectation of gain, and (4) who could, given his lengthy Norfolk County sentence of 20 to 30 years, derive nothing of significance from his cooperation. The prosecutor argued this picture of Carden in his closing.

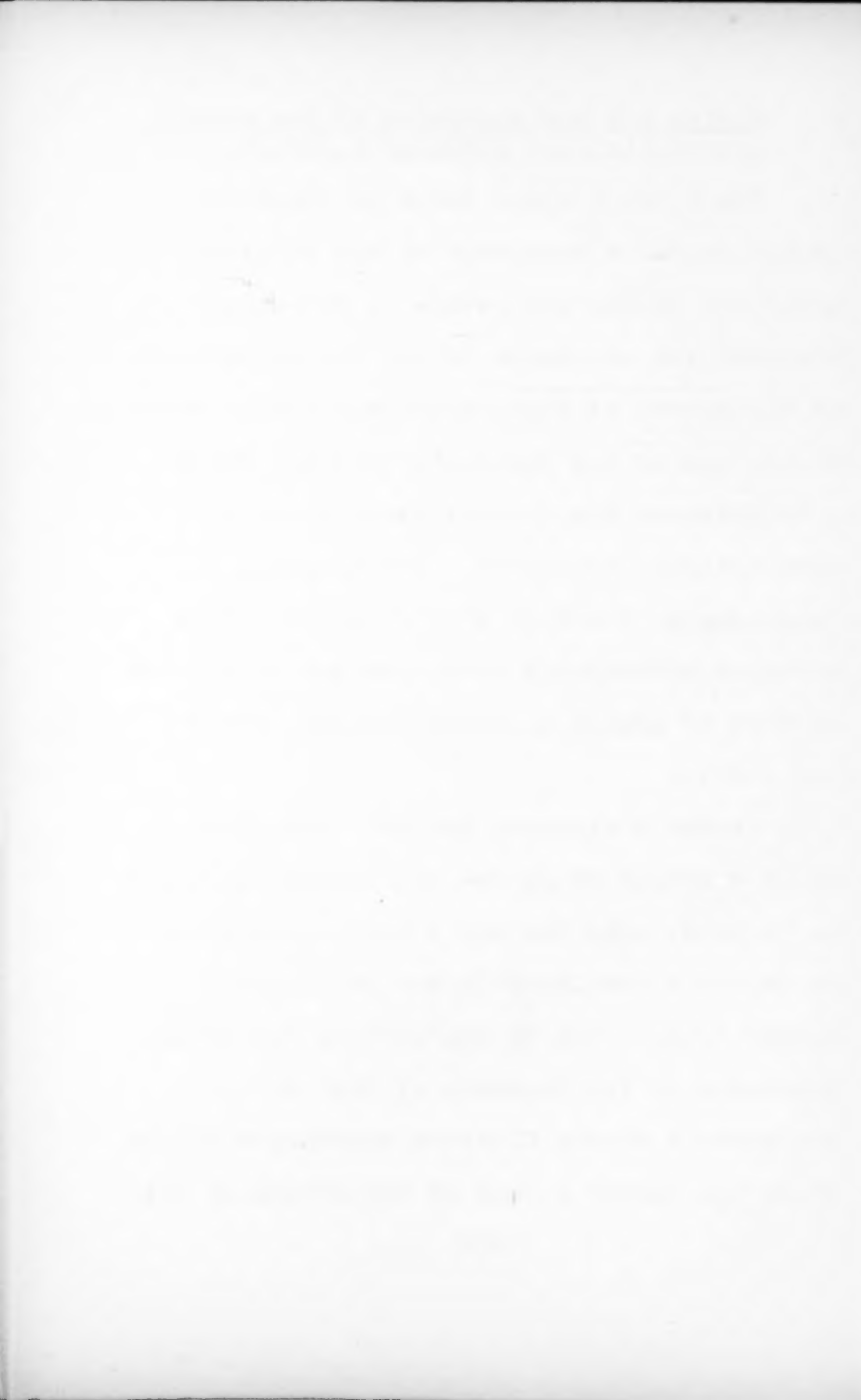
The truth which was known and/or should have been known to the prosecutor was quite the opposite.



A. Giglio And The Knowledge of The Norfolk County District Attorney's Office.

The First Circuit found no reason to impute Carden's knowledge of his pending motion to revise and revoke to Prosecutor Prescott and no reason to put the prosecution to the burden of discovering any action taken by any one of its witnesses that may bring into question the disinterested quality of that witness' testimony. See Campbell v. Fair, supra, 838 F.2d at 3-4; A-110. This position effectively overrules one of the key holding of Giglio v. United States, 405 U.S. 150 (1972).

Carden's attorney had not "recently" filed a motion to revise and revoke; he filed it in 1975, over two and a half years prior to Carden's testimony in the petitioners' murder trial. One of the parties had actual knowledge of the pendency of that motion - the Norfolk County District Attorney's Office which was served a copy of the motion at the



time it was filed and was a party to that litigation. One month after the petitioners' 1977 trial, Prosecutor Prescott appeared at the hearing on Carden's motion to revise and revoke, not as a witness, but as the Assistant District Attorney assigned to handle the matter for Norfolk County.

"When the 'reliability of a given witness may well be determinative of guilt or innocence', nondisclosure of evidence affecting credibility falls within [the Brady rule requiring a new trial regardless of the prosecution's good or bad faith.]" Giglio v. United States, 405 U.S. 150, 154 (1972), quoting Napue v. Illinois, 360 U.S. 264, 269 (1959).

"Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government . . .

To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Giglio v. United States, supra, at 514.

This information was unequivocally in the possession of the Norfolk County District Attorney's Office at the time the petitioners were indicted and under Giglio knowledge of it must be imputed to Prosecutor Prescott.

B. The Promise

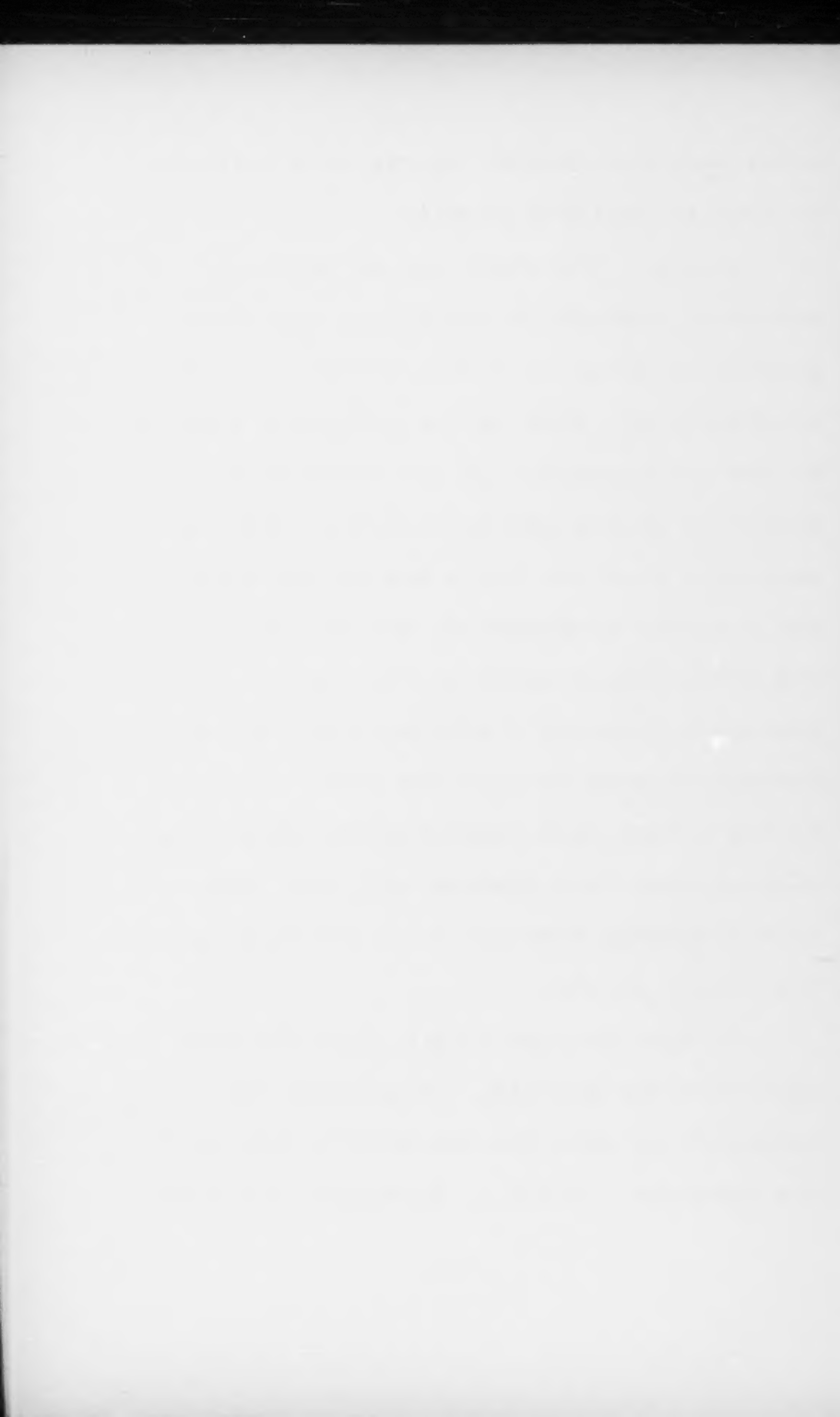
The state motion judge credited in full the prosecutor's testimony concerning Carden's pending motion to revise and revoke his long sentence. The motion judge found that no promise to act favorably on the motion was made despite the serious evidence to the contrary. Because of the "presumption of correctness" the petitioners were well



aware that the federal courts were unlikely to find an explicit promise.

However, the state courts never addressed Prescott's admittedly ambiguous promise to stick by Carden whether or not Delahunt did. This is the promise relied on by the petitioners. It was Prescott who testified at the new trial motion that he made this promise; there was no evidence to the contrary presented to the motion judge, and not a single basis in fact or law to disregard Prescott's admission given that everything else he said was fully credited. To the extent that there was any state court finding that this promise was never made - such a finding does not have any support in the record at all.

It must be pointed out that the more uncertain the promise, the greater the incentive to make the testimony pleasing to the promisor. Boone v. Paderick, 541 F.2d



447, 451 (4th Cir. 1976), cert. denied, 430 U.S. 959 (1977).

The First Circuit rejected the straw man argument about an explicit promise of aid on the revise and revoke motion, but simply failed to address the petitioners' basic proposition concerning Prosecutor Prescott's ambiguous promise.

C. Carden's Favorable Disposition Of His Suffolk Case.

The First Circuit concedes the synergistic effect of receiving some assistance on the Suffolk case with knowledge that the previously imposed 20 to 30 year sentence was open to change on a pending motion to revise and revoke. See Campbell v. Fair, supra, 838 F.2d at 3; A-109. The panel seems to excuse the prosecution on the nondisclosure of the Suffolk disposition because apparently "neither the prosecutor nor defense counsel found anything odd in Carden's answers." See Id., at 2; A-105.



But the reason the defense found nothing odd was because they had been lead to believe that the only case Carden had pending, the Suffolk case, was in fact pending. The prosecutor knew, and so testified, at the motion for new trial hearing, that it had already been disposed of. There is no excuse for his failure to correct Carden's misstatements, and his failure to disclose the disposition of Carden's Suffolk charges to the defense prior to trial.

D. The Carden The Jury Never Saw

Carden was the Commonwealth's whole case, and his testimony was not buttressed in any way. The jury never learned that (1) he had been promised that the prosecutor would stand by him, (2) that he had already received the benefit of a favorable disposition of an outstanding charge, and of critical importance (3) that the shield of his lengthy sentence was in fact no shield at



all. He was in truth a witness with every reason to lie. The First Circuit in this case sanctioned the prosecution's nondisclosure of critical impeachment evidence by overruling sub silentio Giglio v. United States, supra.

II. THE PETITIONER DOHERTY'S FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED SINCE THERE WAS INSUFFICIENT EVIDENCE AT THE STATE COURT TRIAL TO SUSTAIN HIS CONVICTION.

While the evidence must be viewed in the light most favorable to the prosecution, there must be a logical and rational connection between the facts presented in evidence and the ultimate facts to be inferred.

In the case at bar, the First Circuit points to several cases to justify its conclusion that there was sufficient evidence of an agreement between Doherty and the other petitioners. Those cases, with the exception of United States v. Tarr, 589 F.2d 55 (1st

Cir. 1978), involve a significant level of association between the principals involved - exactly what is missing from this case. In the Tarr case, the First Circuit reversed one count for the following reason - "There was no evidence that appellant knew [the other two principals] or that he talked to them at all, even by way of greeting, on the day in question." Id. at 60. The case at bar is no different. There was not one shred of evidence that Doherty ever spoke to, met with, or even knew Campbell or Keigney.

This fact cannot be stressed strongly enough in light of the history of this case since the trial judge's confusion on this issue tainted his directed verdict finding and the jury's guilty verdict. The trial judge was under the completely erroneous impression that there had been a meeting earlier in the day of the murder between the three petitioners and he so charged the jury.



The First Circuit's conclusion that Doherty was a lookout at the 5:00 p.m. incident who spoke loudly to warn the two principals ignores the actual testimony at trial. Doherty was at least 80 feet away from the cell with his back to it, and the cell's solid steel door was closed. See Tr. 4:84. Nor was there a shred of evidence, as the First Circuit suggests, that all the while he was glancing towards Perrotta's cell. There were eight or nine other inmates between Doherty and Perrotta's cell. Nor was his position, close to the right rear staircase, a place where he could stand guard over Perrotta's cell. That cell could be easily reached by using the right front staircase, and thus never coming near Doherty's position. See Addendum Diagram.

While it is true that Perrotta was nervous after Campbell's and Keigney's visit, he was nervous before their visit too. Why

he was nervous or what Campbell and Keigney intended to do at that time are matters of conjecture.

Any inference of knowledge on Doherty's part that Campbell and Keigney were intending to murder Perrotta at that time would be total speculation. No motive evidence for such a murder was ever presented. There was no evidence of any meeting between Doherty, Campbell and Keigney. Most significantly, although Carden had been in Block A-2 for over ten months, he offered no testimony that Doherty even knew Campbell and Keigney. Furthermore, there was no evidence of anything occurring after the 5:00 p.m. lockup that would justify an inference that Doherty knew that Campbell and Keigney intended to murder Perrotta.

As to the 7:30 p.m. incident, the First Circuit's conclusion that Doherty must have known that Campbell and Keigney killed



Perrotta since he was directly in front of the cell at the time it was done seriously distorts the trial evidence, and represents sand castle building at its worse. Doherty was seen in the area for only a matter of seconds.

It is reasonable to conclude that Perrotta's murder occurred between around 7:00 and around 7:30 p.m.; but it is speculation to place it at a more precise time. Carden left Perrotta's cell at around 7:00 p.m. See Tr. 4:95-97. Perrotta's cell was pegged closed at that time. See Tr. 5:49-50. Carden returned shortly after 7:30 p.m. Perrotta failed to answer his visitor call at 7:20 p.m., and he may or may not have been dead at that time. The inmate, perhaps Yandle, who entered Perrotta's open cell (no longer pegged closed) at 7:30 p.m. and said Perrotta wasn't there could not have been telling the truth. Carden was back in the



block by 7:31 or 7:32. See Tr. 3:131.

Perrotta could not have entered his cell unnoticed, been subdued, strangled, and mutilated all within the space of 1 to 2 minutes. It takes longer to die of asphyxiation.

Doherty was seen hanging over the tier in front of Perrotta's cell shortly after 7:30 p.m., and then proceeding to the back of the Block (the First Circuit says "quickly" but there was no such evidence). If he was acting as a lookout he didn't have to show himself. This placement of Doherty for a matter of seconds in the vicinity of Perrotta's cell after repeated shoutings for Perrotta by the guard is totally unexceptional. He was not seen to be looking up and down the tier, nor was he seen to have signalled nor heard to have spoken to Campbell or Keigney. He was not even seen with them at any time. Nor can his

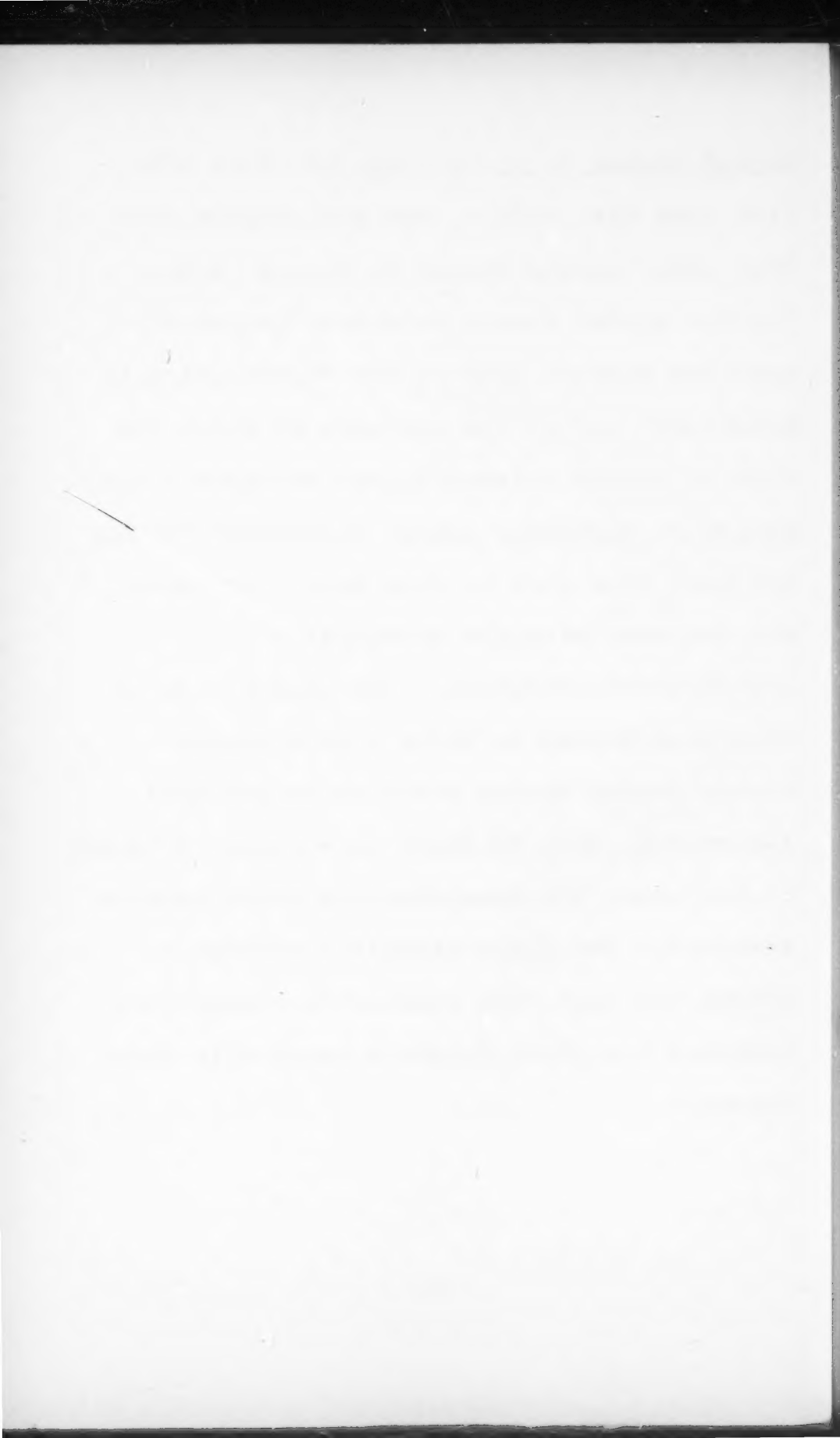


appearance in the area of Perrotta's cell be reasonably tied to the actual time of death, which must have occurred prior to or during Yandle's entry. It must be pointed out that this was a prison cell block where inmates, as Officer McGuire testified, walk up and down the tiers all the time. See Tr. 3:130. Doherty was in that Block because he was put there by the prison authorities. It would be hard to not be there as the trial judge himself pointed out in a different context. Finally, there is no evidence that the cell's sliding steel door was open during the murder. It was not pegged when Yandle went to it, but how he left it or found it was not testified to. The conclusion that Doherty saw the murder is total speculation.

There must be some evidentiary basis for inferring that the defendant knew about the enterprise, in this case a plan to murder Perrotta, and intended to participate in it.



United States v. Di Stefano, 555 F.2d 1094, 1103 (2nd Cir. 1977). See and compare with this case, United States v. Wilson, supra, (prison murder case - defendant helped to make the mixture used to set victim afire by principal, and in the corridor at about the time of murder - insufficient evidence); and Fuller v. Anderson, supra, (defendant turned his head from side to side more than twice and ran away with the principal - insufficient evidence). The prosecution in this case failed to prove with evidence either shared mental state or intentional assistance, both of which were required to be proven under the Massachusetts joint venture standard. The First Circuit's attempt to bridge the gaps with reasonable speculation destroys the proof beyond a reasonable doubt standard.



Conclusion

For the foregoing reasons, the petition
for a writ of certiorari should be granted.

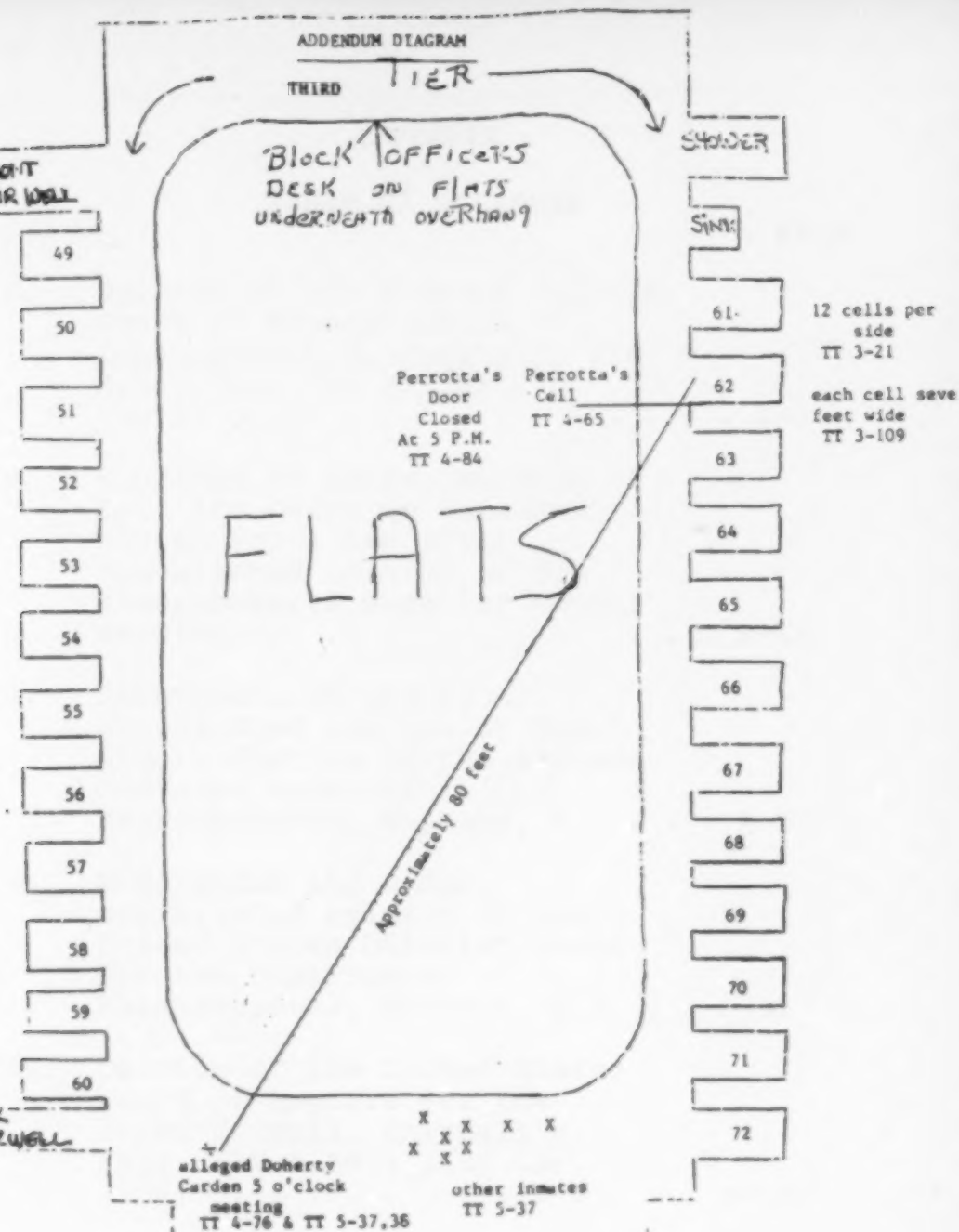
Respectfully submitted,
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BEST AVAILABLE





APPENDIX

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Commonwealth v. John Campbell, Jr.
(and two companion cases¹)

Norfolk, February 6, 1979 - August 7, 1979.

Present: Hennessey, C.J. Quirico,
Braucher, Kaplan, & Wilkins, J.J.

Homicide. Jury and Jurors. Constitutional Law, Jury. Practice, Criminal, Empaneling of jury, Examination of jurors, Location of defendant in court room, Access to witnesses, Discovery, Argument by prosecutor, View, Instructions to jury, Evidence, Expert opinion, Photographs.

INDICTMENTS found and returned in the Superior Court on February 3, 1977.

The cases were tried before Keating, J.

Usher A. Moren for Arthur Keigney.

Alan P. Caplan for Stephen J. Doherty.

Alfred E. Nugent for John Campbell, Jr.

Charles J. Hely, Assistant District Attorney, for the Commonwealth.

QUIRICO, J. Robert A. Perrotta was brutally murdered in his cell at the Massachusetts Correctional Institution (MCI)

¹One against Stephen J. Doherty and one against Arthur Keigney.



at Walpole on November 25, 1976. The defendants John Campbell, Jr., Stephen Doherty, and Arthur Keigney, who were all inmates at MCI Walpole on that date, were indicted, tried, and convicted of murder in the first degree as a result of this incident. Each was sentenced to "imprisonment in the state prison for life." See G.L. c. 265, §§1-2. Their appeals are before us under the provisions of G.L. c. 278, §§33A-33G, and raise a variety of issues.² We affirm the judgments.

The evidence against the defendants consisted primarily of the testimony of Thomas Carden, a close friend and one-time brother-in-law of the victim. Carden testified as follows. On November 25, 1976,

²Errors assigned but not briefed are deemed waived. Commonwealth v. Adrey, 376 Mass. 747, 748 n.1 (1978). Commonwealth v. Horton, 376 Mass. 380, 387-388 (1978). S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1974).



Carden, Perrotta, and the three defendants were inmates in Block A-2 at MCI Walpole. Carden lived in cell 40, which was the third cell on the left-hand side of the second tier. Perrotta occupied cell 62, which was the second cell on the left-hand side of the third tier.³ At about noon on November 25, Carden and Perrotta ate Thanksgiving dinner together. Perrotta finished his own meal and made sandwiches from another inmate's meal. He carried these sandwiches out of the dining hall wrapped in napkins and concealed beneath his bathrobe or his coat.

Perrotta was present in Carden's cell from approximately 3:30 p.m. to 4:45 p.m. Neither inmate went to the evening meal. About 4:45 p.m., Perrotta left Carden's cell

³The cells were counted from the front of the block in Carden's description. Testimony from correction officials explained that catwalks ran around the cellblock at the second and third tier levels. Stairways were located at the front and rear of the block on the right-hand side.



in response to a call by someone. A few minutes later, Perrotta returned in a visibly distressed state. After some conversation, Perrotta left Carden's cell again. Carden consulted his watch and, two minutes later, left the cell. He "hung around" on the landing of the rear stairway for about one minute and then walked up to the third tier landing.

Carden met the defendant Doherty on the third tier landing. Doherty put his hand on Carden's shoulder and talked in a loud voice about selling some marihuana to Carden. He prevented Carden from moving along the catwalk to get to Perrotta's cell. After an interval, the door to Perrotta's cell opened, and Perrotta, Keigney, and Campbell walked out. Doherty thereupon stopped talking to Carden and allowed him to proceed to Perrotta's cell. Carden leaned against the rail and had a brief conversation with



Perrotta, during which Perrotta appeared "very nervous." Shortly afterward, a guard announced the 5 p.m. lockup and count, and Carden went back down to his own cell.

When the lockup ended at 6 p.m., Carden immediately went upstairs to Perrotta's cell. He observed Perrotta lying on the bed wearing headphones. About forty-five minutes later, Carden returned to Perrotta's cell and knocked on the door. Perrotta released an interior locking mechanism and invited Carden into the cell.⁴ After ten minutes, Carden left the cell with two bags on marijuana in order to place a football bet in a neighboring cellblock. En route, Carden stopped briefly in the cell occupied by Thomas McInerney on the right-hand side of

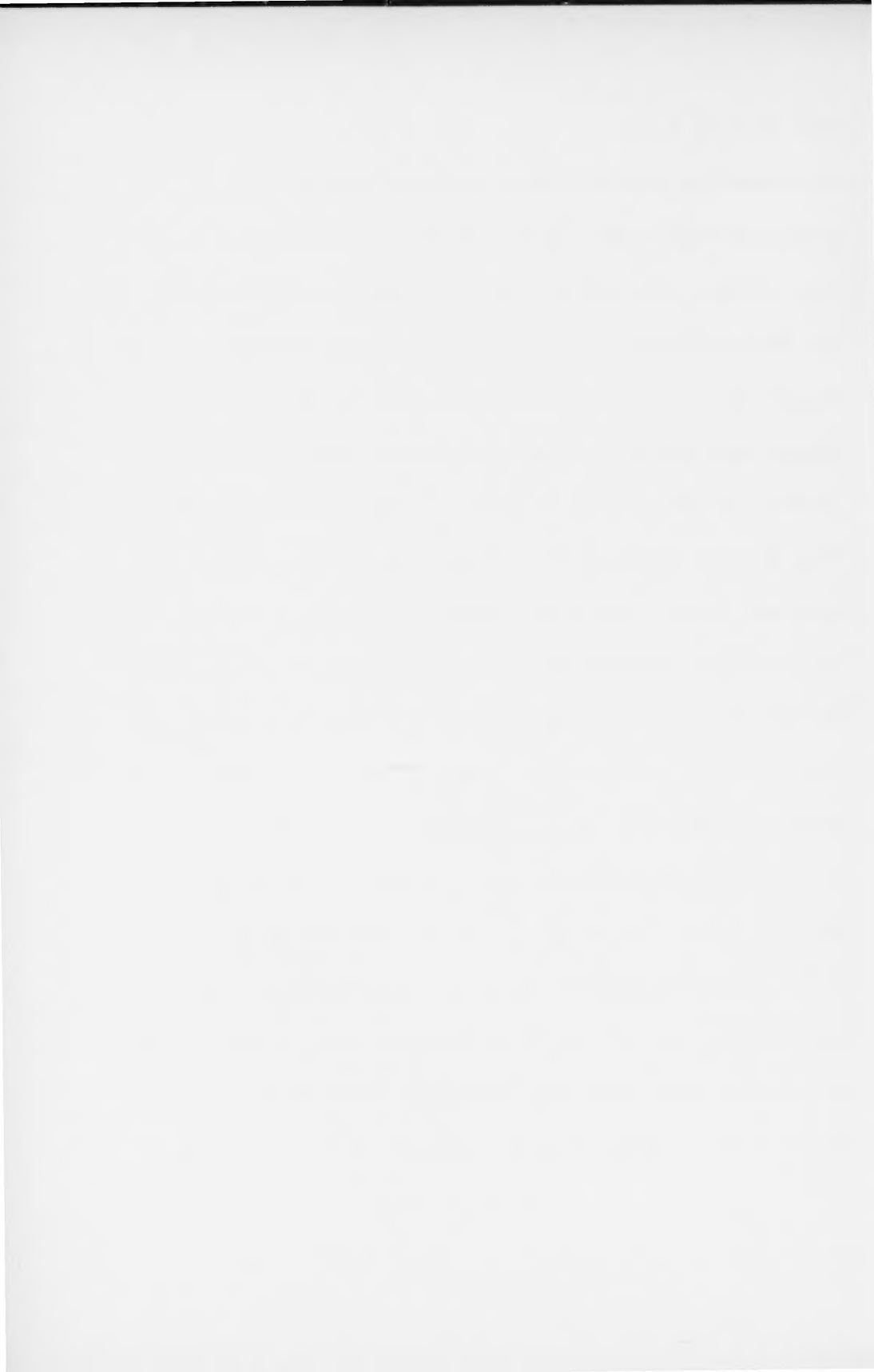
⁴Perrotta's door was locked from the inside with an illegal device called a "door peg." Carden had previously supplied the device to Perrotta and described it as "one of the better types." It could be released from outside the cell only with a tool and some patience.



the third tier.

While Carden was out of Block A-2 placing the bet, a visitor was announced for Perrotta. On hearing a second announcement of Perrotta's visitor, Carden returned to Block A-2. As he entered the block, he observed Doherty leaning over the rail in front of Perrotta's cell. He proceeded up the front stairway. When he reached the second tier, he saw Doherty walking along the third-tier catwalk toward the rear of the cellblock and Keigney and Campbell leaving Perrotta's cell at a fast pace. No one else was present on the catwalk. Carden then proceeded up to Perrotta's cell, and, at about 7:30 p.m., discovered Perrotta's body.

Peter McGuire was the correction officer in charge of Block A-2 during the evening of November 25. While locking Perrotta into the cell during the 5 p.m. count, McGuire "saw

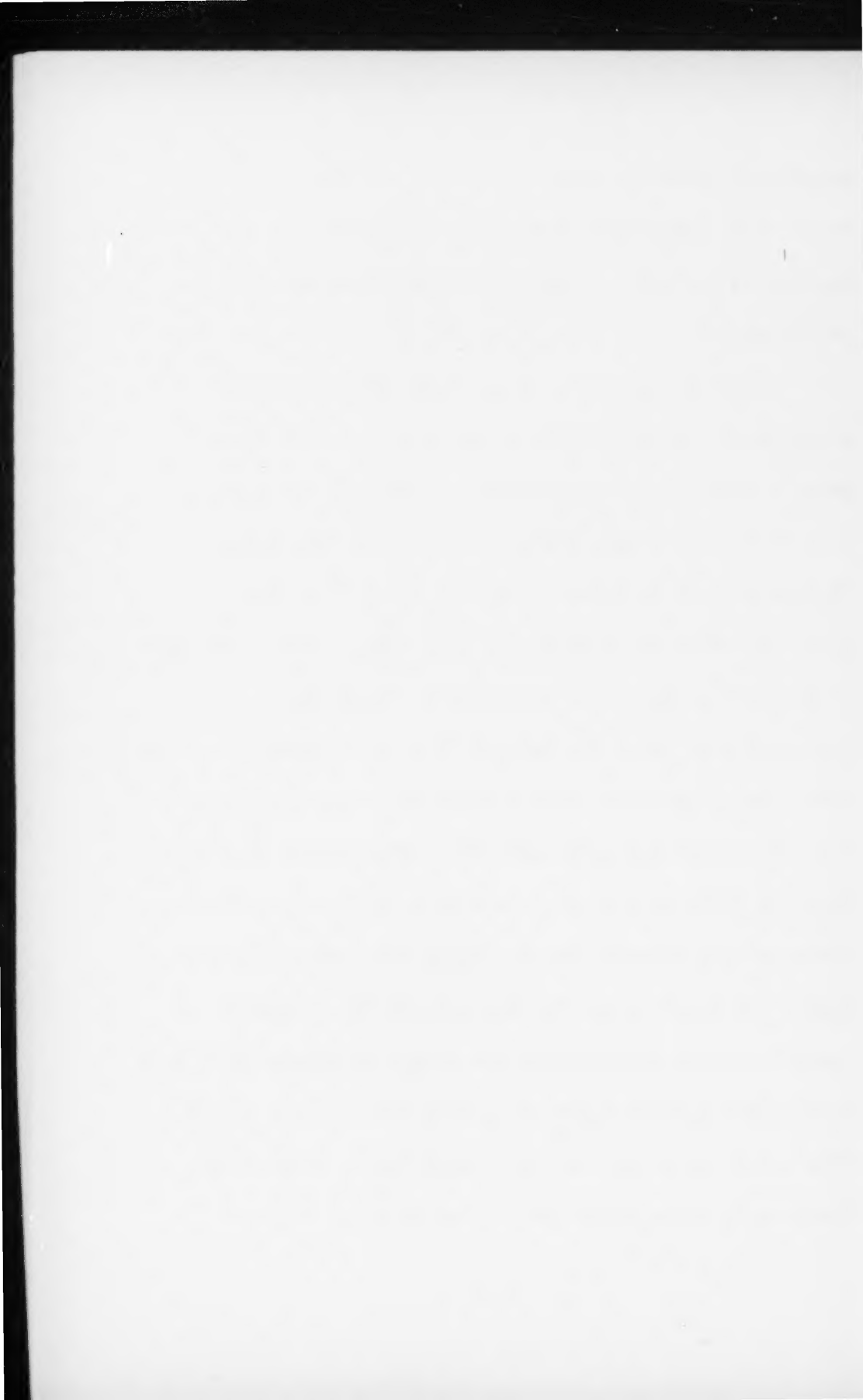


flesh,"⁵ and thereby assured himself that Perrotta was present. Based on the log he kept that night, McGuire testified that Carden left the block at 6:10 p.m., returning at 6:25 p.m., and left again at 7:18 p.m. At 7:20 p.m., McGuire was notified that Perrotta had a visitor. He shouted Perrotta's name but received no response. At 7:30 p.m., McGuire repeated the visitor announcement. An inmate, whom McGuire was unable to identify, was walking along the third tier at this time. This inmate looked into Perrotta's cell and told McGuire that Perrotta was not there. McGuire then telephoned other blocks to have the visitor announcement repeated there. Shortly thereafter, Carden entered Block A-2 in

⁵McGuire explained that, as part of his routine, he would make sure that some part of an inmate's skin was in sight in order to preclude the possibility of an inmate's leaving clothing in the bed while he was elsewhere.

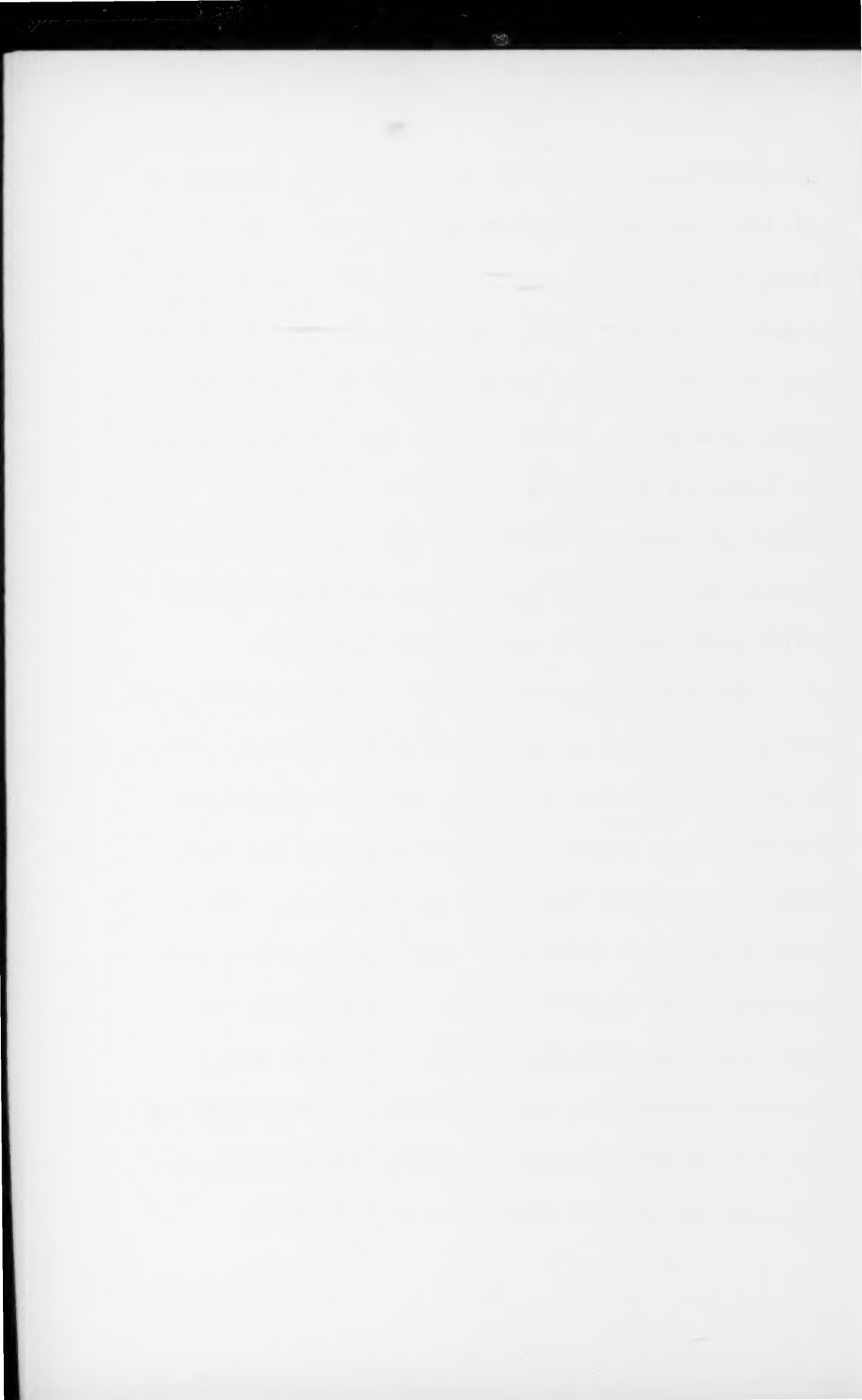
apparent haste, and, looking up to the third tier and ignoring McGuire, he went up to Perrotta's cell. Carden then called for a stretcher.

Dennis Spicer, a prison medic, was summoned to Perrotta's cell at about 7:40 p.m. Perrotta displayed no signs of life, but his skin was warm and normal in color. There was a bright drop of blood on the pillow, but no blood on the bed. Dr. Harold Shenker, a medical examiner, arrived in Perrotta's cell at about 9 p.m. Based on his own observations and those made by Spicer, Dr. Shenker determined that Perrotta had died within two hours preceding 9 p.m. Dr. George Katsas performed an autopsy on Perrotta's body at 4:15 p.m. on November 26. His examination disclosed several bruises and two bathrobe cords tied tightly about the neck. The victim's penis had been torn from his body and inserted into his mouth; this



dismemberment had been done, in Dr. Katsas's opinion, while Perrotta was alive. The stomach contained undigested chicken or turkey together with other food; the food had been in Perrotta's stomach for at most two hours preceding death. Dr. Katsas estimated the time of death as "shortly before" Spicer's observations and two to four hours before Dr. Shenker's, and he concluded that death had resulted from strangulation.

The defense evidence consisted solely of testimony aimed at contradicting subsidiary details in Carden's story and at otherwise discrediting Carden. Thomas McInerney was acquainted with Perrotta and Carden. He testified that Perrotta was rising from the Thanksgiving dinner table with a half-full tray when he arrived, that Perrotta was wearing dungarees and a T-shirt, and that he did not observe Perrotta make sandwiches or see any bulges in Perrotta's clothing.



McInerney also described a conversation at Bridgewater in which Carden asked McInerney to say he "saw something" on November 25, and suggested, "If you back me up, you might even be able to hit the street behind this."

McInerney stated that Carden had not visited his cell around 7 p.m.

One Ronald MacDonald testified to observing an argument between Carden and Perrotta within the week preceding the murder in which Carden expressed dissatisfaction with the way Perrotta was treating Carden's sister (formerly Perrotta's wife) and her children. Carden denied ever arguing with Perrotta about family matters. One Robert Guzowski stated that at some time no later than April of 1977, Carden told him at the Salem House of Correction that "when he got through with his trials and his cases, he was going to get away from here and go to Arizona." Carden denied mentioning a trip to



Arizona during the pendency of the case.

1. Motions for directed verdicts. At the close of the Commonwealth's case in chief, and again after the summations,⁶ each defendant moved for a directed verdict. Following argument, the judge denied the motions subject to the defendants' exceptions. In reviewing the denial of a motion for a directed verdict in a criminal case, we determine whether the evidence offered by the Commonwealth, together with reasonable inferences therefrom, when viewed in its light most favorable to the Commonwealth, was sufficient to persuade a rational jury beyond a reasonable doubt of

⁶The timing of the motions was unusual in that they are normally made at the close of the Commonwealth's evidence and again before, rather than after, the closing arguments. See Rule 70 of the Rules of Superior Court (1974); Mass.R.Crim.P. 26 (b)(1) post 896 (effective July 1, 1979). Inasmuch as no argument is made by the Commonwealth that these motions were not timely made, we do not consider whether the judge was obligated to entertain them.

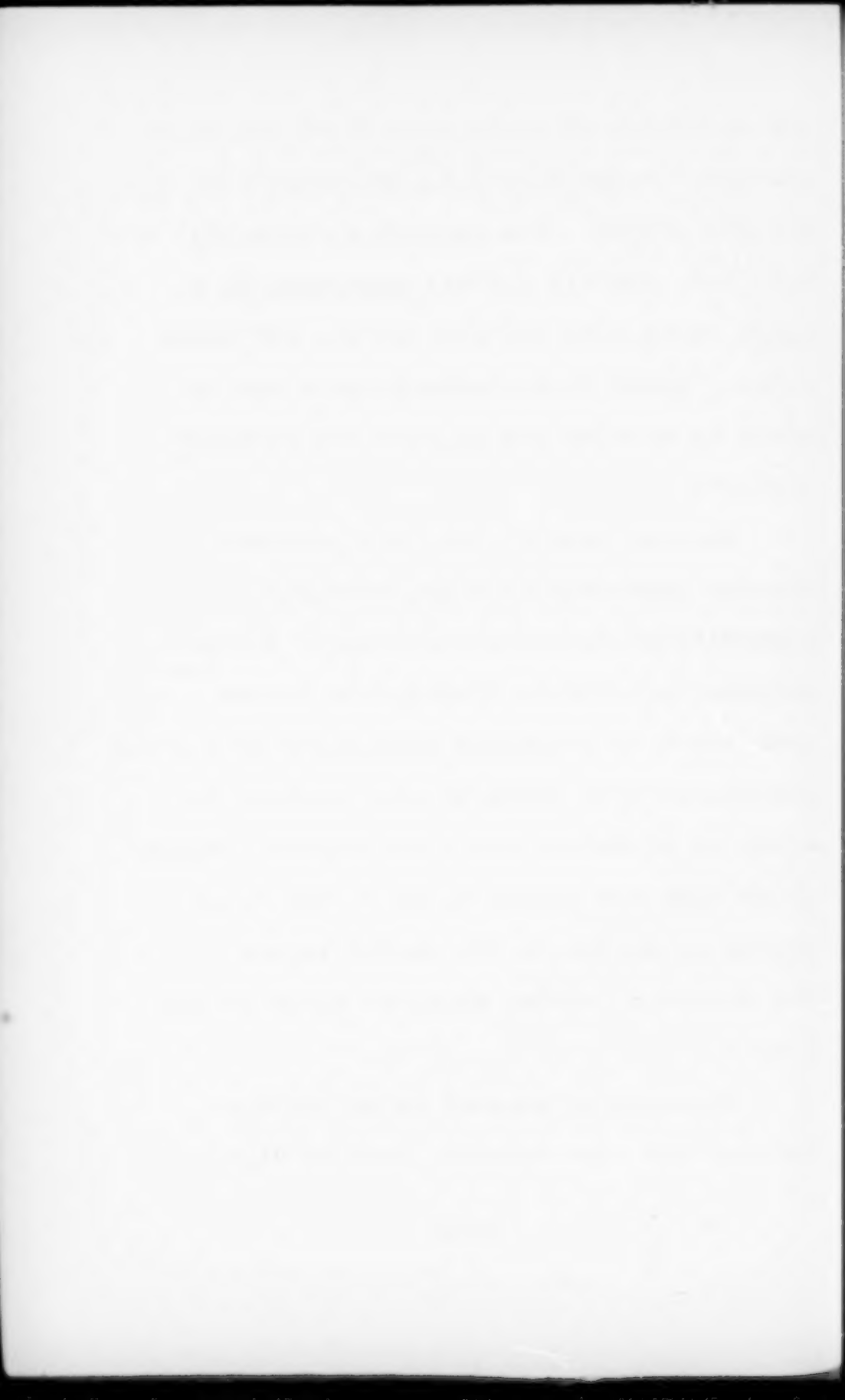


the existence of every element of the crime charged. Commonwealth v. Latimore, ante 671, 676-677 (1979). See Jackson v. Virginia, 443 U.S. 307, 318-319 (1979); Commonwealth v. Clark, ante 392, 403-404 (1979), and cases cited. Under this standard there was no error in denying the motions for directed verdicts.

General Laws c. 265, §1, provides:

"Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree The degree of murder shall be found by the jury."

Speaking in general terms, we have defined the term "murder" used in this



statute to mean the unlawful killing of a human being by another human being with malice aforethought. Commonwealth v. Campbell, 375 Mass. 308, 312 (1978). Commonwealth v. Caine, 366 Mass. 366, 373 (1974). Commonwealth v. McCauley, 355 Mass. 554, 559 (1969). The indivisible phrase of art "malice aforethought" describes with particular mental state accompanying a homicide which makes the act murder and, in so far as is relevant to this case, encompasses the intent to inflict great bodily harm and the intent to kill. E.g., Commonwealth v. Hebert, 373 Mass. 535, 539 (1977); Commonwealth v. Mangum, 357 Mass. 76, 85 (197). See generally R. Perkins, Criminal Law 30-40 (1957).

A killing is premeditated if the "resolution to kill was a product of cool reflection." Commonwealth v. Blaikie, 375 Mass. 601, 605 (1978). "[N]o particular



length of time is required in order for deliberate premeditation to be found."

Commonwealth v. Caine, supra at 374.

The use of extreme atrocity or cruelty, a second basis for finding the defendants guilty of murder in the first degree in this case,⁷ was recently described in the following words: "This issue must be left largely to the jury There is no requirement that the defendant know that his act was extremely atrocious or cruel, and no requirement of deliberate premeditation A murder may be committed with extreme atrocity or cruelty even though death results from a single blow Indifference to the victim's pain, as well as actual knowledge of it and taking pleasure in it, is cruelty; and extreme cruelty is only a higher

⁷There was no evidence that the killing in this case occurred during the commission or attempted commission of a felony so as to make the definition of felony murder relevant.

degree of cruelty" (citations omitted).

Commonwealth v. Golston, 373 Mass. 249, 260 (1977), cert. denied, 434 U.S. 1039 (1978).

Applying these definitions, it is apparent that there was a case for the jury on this issue of murder in the first degree. The evidence tended to show that Perrotta died of strangulation following brutal dismemberment. The jury could infer that the wounds were not self-inflicted; that they were inflicted intentionally, with at least the purpose of causing grievous bodily harm to Perrotta; and that the use of two ligatures implied that the killing had been deliberately premeditated. The amputation of Perrotta's penis while he was yet alive could be found to have been extremely atrocious and cruel.

All the defendants argue, however, that the circumstantial evidence linking them with the crime was insufficient to warrant



submitting the case to the jury. Doherty argues in addition that there was insufficient evidence concerning his own state of mind to allow the jury to consider his guilt as a joint entrepreneur. We disagree.

The evidence against Keigney and Campbell, while somewhat thin, was sufficient to warrant submitting the case to the jury. Both defendants were seen leaving Perrotta's cell at about the time when the 5 p.m. lockup was announced and again at about the time when, according to one view of the medical evidence, the victim was slain. See Commonwealth v. Robertson, 357 Mass. 559, 562-563 (1970). The jury could properly infer that the presence of Keigney and Campbell in Perrotta's cell was not for any normal purpose. See Commonwealth v. Belton, 352 Mass. 263, 266-267, cert. denied, 389 U.S. 872 (1967). Perrotta was nervous after



the first of these visits to his cell and he was found dead after the second. Moreover, the evidence that Keigney and Campbell failed to alert guards to Perrotta's condition permits an inference that they were not mere passersby who happened on the scene innocently. See Commonwealth v. Vellucci, 284 Mass. 443, 445-446 (1933). In cumulation, the various items of evidence and permissible inferences therefrom were sufficient to warrant the submission of the cases to the jury as against Keigney and Campbell.⁸

Although a somewhat closer question is

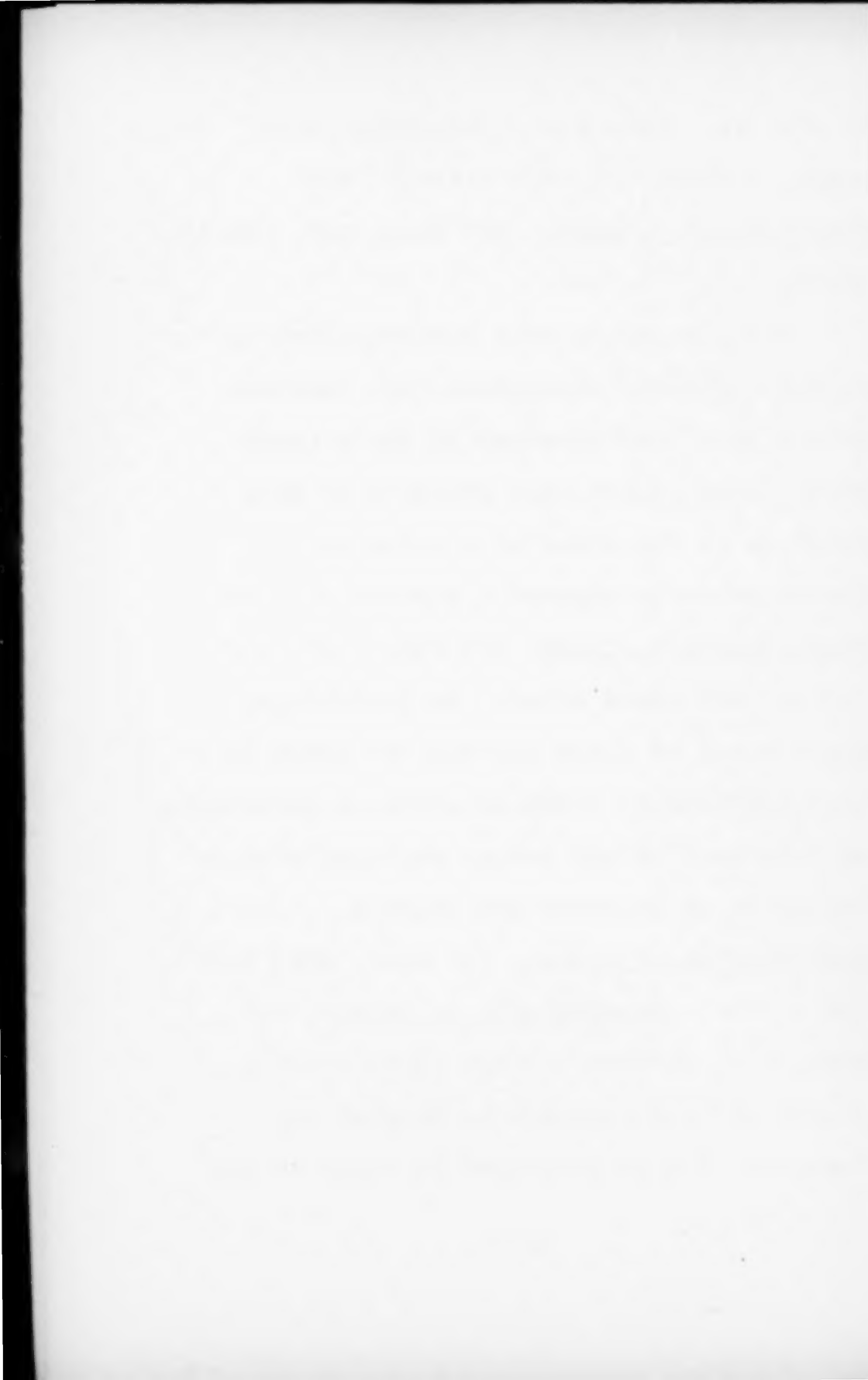
⁸It was, of course, unnecessary for the Commonwealth to prove a motive for the crime, Commonwealth v. Goldenberg, 315 Mass. 26, 33 (1943), or to prove lack of opportunity by every other person. Commonwealth v. Adrey, 376 Mass. 747, 756 (1978), and cases cited. Similarly, it is of no particular moment that almost the entire evidence against the defendant came from one fellow inmate because questions of credibility are for the jury alone to resolve. Commonwealth v. McCauley, 355 Mass. 554, 560 (1969).

presented with respect to Doherty, we believe that the evidence was also sufficient as to him. Carden testified that Doherty obstructed his passage to Perrotta's cell shortly before 5 p.m. by placing a hand on his shoulder and engaging in loud conversation. He further testified that Doherty abruptly ceased these activities when Keigney and Campbell emerged from Perrotta's cell. Carden also testified to seeing Doherty leaning over the rail in front of Perrotta's cell just before the body was discovered. The jury might reasonably infer that Doherty was acting as a lookout on both occasions. If they so found, they would be justified in concluding that at the time Keigney and Campbell were murdering Perrotta, Doherty was present near the scene, purposefully aiding and abetting them in the commission of the crime, and that by reason thereof he was guilty as a principal. G.L.



c. 274, §2. See, e.g., Commonwealth v. Knapp, 9 Pick. 496, 518 (1830). Cf. Commonwealth v. Perry, 357 Mass. 149, 161-162 (1970).

The defendants make two arguments in support of their contention that verdicts should have been directed in their favor. First, they assert that evidence of mere presence at the scene of a crime is insufficient to support a conviction. See Commonwealth v. Clark, 363 Mass. 467, 473 (1973), and cases cited. As to Doherty, application of Clark and similar cases is inappropriate in light of evidence permitting an inference of his actual participation in the crime as an aider and abettor. Commonwealth v. Michel, 367 Mass. 454, 456-459 (1975). Commonwealth v. Conroy, 333 Mass. 751, 754-755 (1956). The reliance placed on this argument by Keigney and Campbell is also misplaced in light of the



evidence tending to show their commission of the crime. Second, the defendants argue that, because several inferences were possible from the fact of their presence in the cell, a guilty verdict would necessarily be based on conjecture or surmise. See, e.g., Commonwealth v. Fancy, 349 Mass. 196, 200 (1965), and cases cited. The only inference inconsistent with guilt suggested by the defendants, however, is that they were mere happenstance visitors to Perrotta's cell. Their failure to take any action on discovering the body weakens this inference. Although the inference suggested by the defendants is conceivable, "[i]t is sufficient that the evidence permitted the inference which the jury obviously drew against [the defendants]." Commonwealth v. Nelson, 370 Mass. 192, 203 (1976).

We hold that the judge correctly denied the motions of all three defendants for



directed verdicts of not guilty.

2. Selection of additional venire.

During the first day of trial, eleven jurors were empaneled and the available venire was completely exhausted. The judge orally ordered fifty jurors to be brought in the next day.⁹ Court officers chose names from past jury lists and made about eighty telephone calls, with the result that sixteen additional jurors appeared in court on the second day. Of the sixteen, ten listed themselves as retired, four as "housewife" or "at home," and two as employed. On seeing the list, counsel for the defendants challenged the array as not fairly representative of the community. After the judge denied these motions, counsel requested an opportunity to interrogate the responsible

⁹The judge also issued a written order directing the sheriff to procure thirty persons "from the bystanders or from the County at large qualified and liable to be drawn as jurors."

court officer under oath or during a recess. The judge denied these requests as well. Three jurors were eventually seated from the group of sixteen additional veniremen.¹⁰

The defendants assert that the procedure used to obtain the sixteen additional jurors violated their constitutional right to trial by a jury drawn from a cross-section of the community and their right to have the jurors summoned under a regular, statutory procedure. We address these contentions in the order we have stated them.

a. Constitutional argument. We accept, *arguendo*, the defendants' unsupported assertion that the ten "retired" persons in the venire were older than sixty-five and that six other persons were younger. For the purpose of this appeal, we also assume that the high proportion of elderly persons in the

¹⁰Two other jurors were seated on the second day from a group of seven taking from other court sessions.

additional venire could not have arisen by chance alone.

The Supreme Court has held that "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor v. Louisiana, 419 U.S. 522, 528 (1975). For the defendants to prevail on their claim of denial of this right, they must establish two facts. First, they must demonstrate exclusion of a constitutionally significant class of persons. See *id.* at 531-533; Duren v. Missouri, 439 U.S. 357, 364 (1979); United States v. Hawkins, 566 F.2d 1006, 1014-1015 (5th Cir.), cert. denied, 439 U.S. 848 (1978). We may assume without deciding that persons under sixty-five, who were substantially underrepresented in the additional venire, possess characteristics sufficiently discrete to justify treating

f

them as such a class.¹¹ See United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970); J. M. Van Dyke, Jury Selection Procedures 35-39 (1977). But see Commonwealth v. Johnson, 372 Mas. 185, 198 (1977); Commonwealth v. Lussier, 364 Mass. 414, 423-424 (1973); United States v. Test, 550 F.2d 577, 590-593 (10th cir. 1976).

There exists, however, a second prerequisite to a successful Sixth Amendment

¹¹We emphasize that the record is devoid of evidence to justify the conclusion that young persons either have or lack attitudes or abilities that differ from those of older persons in ways having constitutional significance. We acknowledge Mr. Justice Marshall's admonition that "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable . . . [and to deprive] the jury of a perspective on human events that may have unsuspected importance" Peters v. Kiff, 407 U.S. 493, 503-504 (1972). The Supreme Court has never, however, held that age classification in jury selection are constitutionally suspect. See Hamling v. United States, 418 U.S. 87, 137 (1974).



challenge. In the Taylor case, the Court emphasized that it imposed "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." 419 U.S. at 538. Rather, the Court held only that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof" (emphasis supplied). Id. Accord, Duren v. Missouri, supra; Commonwealth v. Williams, ante 217, 221 (1979). A finding of a systematic exclusion of young persons would be wholly unwarranted on the present record, which shows only the bare facts about one specific venire containing only sixteen persons. See United States v. Whiting, 538 F.2d 220, 222 (8th Cir. 1976).

We must, therefore, conclude that no



Sixth Amendment violation was made out. We are unable to determine from the record before us whether the evidence sought to be obtained by examining the court officer who supervised the summoning of the additional venire would have been relevant to the crucial question whether elderly persons were systematically overrepresented in Massachusetts venires. It is unnecessary for us to consider whether the judge's denial of an immediate opportunity to adduce such evidence was constitutional error. Cf. Test v. United States, 420 U.S. 28, 19 (1975) (error to deprive defendant of immediate access to master jury lists). This is because defense counsel could have interviewed the court officer at some other time during or after the court day on which the question was raised, and they could then have renewed their motion to quash based on the information gained thereby. It does not



appear from the record that they attempted to do this. From all that does appear the judge merely exercised his discretionary control over the selection of jurors in declining to interrupt the empaneling process for an immediate voir dire or recess. Cr.

Commonwealth v. Amazeen, 375 Mass. 73, 83 (1978); Commonwealth v. Montecalvo, 367 Mass. 46, 51 n.3 (1975). There is no merit in the additional contention of Keigney and Campbell that their rights to confrontation were somehow infringed: the court officer was not a witness against them in any criminal proceeding.

The record now before us does not adequately raise the issue whether the procedure used to select the additional venire comported with the Massachusetts Constitution as interpreted in Commonwealth v. Soares, 377 Mass. 461 (1979). We therefore express no view concerning that



issue. See id. at 493 n. 38.

b. Statutory argument. The defendants also argue that the procedure used to summon the additional venire was statutorily irregular, and they ask us to reverse their convictions on that ground alone. The skeleton, but not the details, of the procedure to be followed when a venire is exhausted is set forth in G.L. c. 234, §27: "If, by challenge or otherwise, a sufficient number of jurors duly drawn and summoned cannot be obtained for the trial of a case, the court shall cause jurors to be returned from the bystanders or from the county at large, to complete the panel, if there are on the jury not less than seven of the jurors who were originally drawn and summoned as before provided. The jurors from the bystanders shall be returned by the sheriff or his deputy or by a disinterested person appointed therefor by the court, and shall be



such as are qualified and liable to be drawn as jurors." Although the precise nature of the defendants' argument is unclear, they appear to ask us to hold as a matter of statutory construction that the informal procedure adopted by the court officer for summoning "talesmen" under this statute, with its inherent capacity for discrimination and unauthorized exemption was illegal. See Commonwealth v. Dickerson, 372 Mass. 783, 792-795 (1977). We decline to hold.

The use of talesman to supplement ordinary jury pools is of great antiquity, dating in Massachusetts from St. 1699-1700, c. 1, §4, and in England from St. 35 Hen. 8, c. 6 §6 (1543). See generally 3 W. Blackstone, Commentaries 364-365 (Christian ed. 1807); 4 id. at 354-355. Although Parliament may have initially conceived that talesmen would be chosen at random from the crowd of bystanders, one of the few appellate



decisions considering the allowable methods of selecting talesmen concluded that choosing names from the regular jury lists was permissible. Rex v. Dolby, 107 Eng. Rep. 322, 324-325 (K.B. 1823). The only Massachusetts case on point reached a similar conclusion. See Commonwealth v. Sacco, 255 Mass. 369, 416-418 (1926). In both cases, the courts focused their analysis on the absence of proved bad faith or demonstrable prejudice. 107 Eng. Rep. at 324, 255 Mass. at 417. In Dolby, the court also noted the desirability of allowing officials to exercise discretionary selectivity and thereby avoid random choice. 107 Eng. Rep. at 324.

The reasoning in Dolby and Sacco is incomplete by modern standards, for it encompasses only considerations akin to due process and ignores the values of representativeness and randomness now thought



implicit in the right to jury trial. Cf. Taylor v. Louisiana, supra at 528. In the absence of proof that the Massachusetts jury system, including the occasional use of talesmen, operates generally to produce unrepresentative juries, however, fairness to an individual defendant remains as the only relevant criterion for measuring the selection process in a particular case. Fairness in turn depends on the absence of prejudice to the defendant.

The defendants have not shown that they were prejudiced by the manner in which talesmen were summoned. Cf. C.L. c. 234, §32 (irregularity in jury selection not reversible error unless objecting party injured thereby or unless objection made before verdict); Commonwealth v. McKay, 363 Mass. 220, 222-223 (1973) (semble) (injury must be shown even if objection timely). We may conclude only that the court officer had

the opportunity to pick and choose the talesmen. As Dolby and Sacco demonstrate, the use of substantial discretion in the summoning of talesmen has ample historic antecedents and cannot be said to be inherently unfair. Moreover, the need for talesmen is presumably infrequent, and we are loath to set down inflexible constraints for what amounts to an emergency power to complete a jury. Accordingly, we hold that no reversible error has been demonstrated.

3. Manner and content of voir dire. The defendants challenge the method by which the judge interviewed prospective jurors. The method was as follows. The clerk would draw and announce the names of jurors selected from the jury pool until every seat in the jury box was full. The judge would then ask a number of questions to determine whether the jurors selected stood indifferent. A juror desiring to make an affirmative



response would raise his or her hand and be heard by the judge at the end of the bench farthest from the jury. After excusing some jurors on the basis of their answers, the judge would direct the clerk to draw and call enough additional jurors to replace those previously excused. The question, answer, and end-of-bench conference cycle would then be repeated until the judge was satisfied with the jurors then filling the box.

Thereupon, the Commonwealth would exercise its peremptory challenges, and the box-filled process would resume. When the judge and the Commonwealth were both content, the defendants would exercise their peremptory challenges. This process continued until sixteen jurors were finally seated. All during the process, jurors who were part of the jury pool but not yet selected sat in the back of the court room where they could hear the judge's questions. Indeed, the judge



shortened his statement of the voir dire questions after the first time in reliance on what the jurors had already heard.

Prior to embarking on this method of conducting voir dire, the judge denied motions that each prospective juror be questioned individually. There was no abuse of discretion. Commonwealth v. Montecalvo, 367 Mass. 46, 48-51 (1975), established that a judge may propound voir dire questions collectively. As we noted in Commonwealth v. Jackson, 376 Mass. 790, 799 (1978), collective questioning does not necessarily inhibit truthful answers. And, as we held in Montecalvo, the deprivation of an opportunity for observing a prospective juror's demeanor lacks legal significance. 367 Mass. at 50.

The defendants nonetheless argue that individual voir dire was mandated by the second paragraph of G.L. c. 234, §28, inserted by St. 1973, c 919, and amended by



St. 1975, c. 335. That paragraph provides:

"For the purpose of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall . . . examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the issues in the case. Such examination . . . shall be conducted individually and outside the presence of other persons about to be



called as jurors or already called."

If we were to assume, without deciding, that questioning jurors at the end of the bench farthest from the jury box was not "outside the presence" of other prospective jurors, that assumption would avail the defendant nothing because they failed to show any substantial risk that their cases would be decided on extraneous considerations. In the circumstances of this case, when the principal evidence against the defendant came from a prison inmate, the prejudice, if any, by jurors against inmates as a class would be likely to favor the defendants as to harm them. There was, therefore, no need for individual questioning.¹²

4. Court room seating. Before trial,

¹²Because there was no demonstrated risk of decision on extraneous grounds, it was within the judge's discretion whether to ask additional questions beyond those mandated by G.L. c. 234, §28, First. See Commonwealth v. Horton, 376 Mass. 380, 393 (1978), and cases cited.



Doherty's counsel asked that Doherty be permitted to sit at the counsel table in order to facilitate consultation as the trial progressed. The judge denied the request and ordered all defendants seated in the front spectator bench, some distance from the counsel table. In addition to asserting generally that the court room seating plan abridged the right to effective assistance of counsel, Doherty notes two incidents that, he says, prejudicially inconvenienced his defense.¹³ We perceive no error.

¹³At one point during the voir dire of prospective jurors, the judge explained for the record "that counsel . . . is discussing the selection of jurors with the defendant." The second incident occurred during the direct examination of Officer McGuir and is reflected by the following colloquy between the judge and Doherty's lawyer:

THE JUDGE: "If you have any puzzlement, Mr. Caplan, I would appreciate it not being reflected on your face as you look at your client."

COUNSEL FOR THE DEFENDANT DOHERTY: "If your Honor please, I looked at my client, as I think I have a right to do, but I . . ."

THE JUDGE: "I am interpreting your expression. I do not appreciate it."



We have repeatedly held that court room seating is a matter within the discretion of a trial judge. Commonwealth v. Walker, 370 Mass. 548, 573-574, cert. denied, 429 U.S. 943 (1976), and cases cited.¹⁴ We have, moreover, consistently rejected claims that separate seating impermissibly diminishes the effectiveness of counsel. Commonwealth v.

¹⁴The United States Court of Appeals for the First Circuit has recently commented adversely on the Massachusetts practice of requiring prisoners to sit in a "dock." Walker v. Butterworth, 599 F.2d 1074, 1080-1081 (1st Cir. 1979), rev'g 457 F.Supp. 1233 (D.Mass. 1978). For the time being at least, the rule stated in the text may not apply to the prisoner's dock in a Massachusetts court room.

In this case, however, the defendants were seated in spectator seats rather than the dock. "The impression that [the defendants were] somehow different or dangerous" (*id.* at 1080) would not, we presume, be so great as to fall within the Walker rule. Clearly, the defendants must be seated somewhere if they are to be accorded their constitutional right to be present at their trial. Equally clearly, no every incident or circumstance which focuses the jury's attention on the fact that the defendants are the persons on trial can be considered to invade constitutional rights.



Bumpus, 362 Mass. 672, 680 (1972), judgment vacated and remanded on other grounds, 411 U.S. 945 (1973), aff'd on rehearing, 365 Mass. 66 (1974). Guerin v. Commonwealth, 339 Mass. 731, 734-735 (1959).

Doherty has not shown that communication at any particular juncture was both impossible and essential to securing a fair trial. We therefore see no reason to abandon our settled rule that seating is within a judge's discretion. The two incidents isolated by Doherty do not indicate that counsel was hampered in conferring with his client. They exemplify the judge's control over the conduct of the trial, but they do not, without more, show interference with the effectiveness of counsel. We are not persuaded that these particular comments by the judge prejudiced the defendant, and we therefore express no view concerning their propriety.



5. The Carden interview. During a recess, defense counsel sought to interview Thomas Carden before he took the stand. Carden was being held in custody in the basement of the court house. Counsel requested that others initially present in the detention room - including the district attorney, the court clerk, and two correction officers - leave, and this request was honored. Counsel also requested that the door be closed to ensure privacy. This request was denied on the ground that a correction officer had to keep Carden in view at all times. Carden declined to be interviewed. In a subsequent lobby conference, the judge denied motions to bring Carden before the court for the purpose of informing him of his right to consult with defense counsel if he so desired. The defendants now argue that the circumstances of the meeting between Carden and counsel,



coupled with the judge's refusal to apply pressure from the bench, constituted prejudicial error.

Since the decision in Commonwealth v. Balliro, 349 Mass. 505 (1954), it has been the settled law of this Commonwealth that defense attorneys are entitled as of right to access to witnesses who are in the custody of the Commonwealth. Id. at 516-517. Accord, Commonwealth v. Flynn, 362 Mass. 455, 461 (1972); Commonwealth v. Carita, 356 Mass. 132, 142-143 (1969). The right encompasses only the opportunity for an interview, and a prosecution witness is free to talk with defense counsel or not, as he chooses. Commonwealth v. McLaughlin, 352 Mass. 218, 223-224, cert. denied, 389 U.S. 916 (1967). Cf. Commonwealth v. Carita, supra (Ballira rule unsatisfied where prosecutor communicated witness's refusal). If an interview occurs, however, it should be

"without the presence of the prosecutor or police officers." Commonwealth v. Flynn, supra. Commonwealth v. Doherty, 353 Mass. 197, 211 (1967), cert. denied, 390 U.S. 982 (1968). In addition, where there is a reasonable question whether or not the witness has voluntarily refused an interview, the preferable procedure is for the trial judge to inform him of the defendant's right to an interview and of his own right to refuse one, and to obtain his expression of consent or nonconsent on the record. Commonwealth v. Carita, supra at 143.

We have never held that every reluctant witness should be required to appear before the court for the purpose of expressing a demonstrably informed refusal to talk with defense counsel. Used as a matter of course, such a procedure would produce unwarranted delays in pending trials and would, in many cases, be likely to engender resentment or to



overbear the witness's free choice. In a case such as Commonwealth v. Carita, supra, where counsel are unable to communicate directly with the witness to request an interview, formal record proceedings may be entirely appropriate. In a case such as this one, however, where access is arranged informally through the cooperation of the prosecutor, an equally informal expression of refusal by the witness is adequate. Since Carden, the witness in question, was a prisoner serving a sentence, we discern no error in the positioning of a correction officer outside the open door to the detention room where the interview would take place. The record affords no basis for concluding that this security measure significantly deterred Carden from granting an interview. Security considerations practically demanded that a guard be nearby since Carden had, in fact, previously escaped



from a Massachusetts house of correction.

In short, the circumstances of the Carden interview do not require reversal. The case of Salemme v. Ristaino, 587 F.2d 81 (1st Cir. 1978), offers no comfort to the defendants, for it requires a threshold showing of prejudice that our own cases do not require. Compare *id.* at 87-88, with Commonwealth v. Balliro, *supra* at 517. In any event, the defendants had made no constitutional argument relative to the Carden interview beyond merely citing Salemme. We therefore express no view on any Federal questions that may be implicated. See Commonwealth v. Adrey, 376 Mass. 747, 756 (1978); S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1974).

6. Handling of discovery motions. Before and during the trial, the defendants made a number of motions for discovery of certain documents. As a result of these



motions, the defendants were furnished with unedited copies of Carden's testimony before the grand jury on two separate occasions and with the unedited copy of an interview between police officials and Carden on December 11, 1976. At the direction of the judge, the prosecution edited a transcript of an interview with Carden on December 1, 1976, and turned an edited copy over to the defense. Police Detective Lieutenant William Bergin, who conducted the initial investigation of the murder, prepared a report dated November 29, 1976, in which he described his initial investigation. When the existence of this report came to light during trial, the judge refused to order the Commonwealth to turn it over to the defendants, to read the report and determine its relevance, or to identify and preserve the report for purposes of this appeal. Finally, the defendants at various times



moved to inspect records concerning Carden and Perrotta that were maintained by correction officials. When the designated records were produced pursuant to a subpoena, the judge refused to allow defense counsel to inspect them, to read them himself to determine their relevance, or to identify and preserve them for purposes of this appeal.

We are confronted on this appeal with a situation where the record prevents us from performing meaningful review with respect to the withholding of these various documents from the defendants. Cf. Commonwealth v. Pisa, 372 Mass. 590, 598 n.6, cert. denied, 434 U.S. 869 (1977). The judge plainly had the responsibility to review and pass on the propriety of any editing of the record of the December 1 interview with Carden rather than to delegate that job entirely to the prosecutor. He further should have identified and preserved as part of the



record on appeal the report prepared by Lieutenant Bergin and the records subpoenaed from the Department of Correction. See Commonwealth v. Lewinski, . 367 Mass. 889, 803 (1975); Mass.R.Crim.P. 23(c), post 893 (effective July 1, 1979). His failure to perform these judicial tasks leaves the case in a posture where we have nothing to review beyond his failure to act, but where there is no indication as to whether the judge's error was harmful. In these circumstances, although we affirm the convictions, we do so without prejudice to the right of the defendants to seek further relief by motions for new trials on the ground that the denial of their requests for access to the various documents deprived them of fair trials.

It may prove helpful for us to amplify the considerations which may become relevant in ruling on future motions for new trial in these cases. On motion of the district



attorney, we impounded a copy of the report by Lieutenant Bergin and made it a part of the record. See Commonwealth v. Lincoln, 368 Mass. 281, 285 n. 2 (1975). We have examined it and believe that defense counsel ought to be shown a copy thereof for their own evaluation, particularly because it contains a description of how Lieutenant Bergin first learned the names of the defendants from Carden on the day following the murder. Cf. Commonwealth v.. Gilbert, 377 Mass. 887, 892-894, (1979) (duty of prosecution to disclose certain oral statements of witnesses to avoid misleading defense). Arguing with the knowledge of how the report might have assisted their trial or preparation of the case, counsel may be able to persuade the judge that justice requires a new trial.

Somewhat different considerations appear relevant with respect to the institutional records subpoenaed from the Department of



Correction. Our cases are very clear that a prosecutor has no duty to investigate every possible source of exculpatory information on behalf of the defendants and that his obligation to disclose exculpatory information is limited to that in the possession of the prosecutor or police.

Commonwealth v. Adrey, 376 Mass. 747, 753-754 (1978). Commonwealth v. Lewinski, supra at 899-900. Commonwealth v. Gilday, 367 Mass. 474, 487, 489 (1975). Commonwealth v. Stone, 366 Mass. 506, 510-511 (1974). Given the size of the government of this Commonwealth, it makes no practical sense to require the prosecutor to obtain and carefully comb the records concerning Carden and Perrotta in the remote hope of discovering something that might tend to exculpate the defendants. This is especially true when the defendants were themselves free to interview the officials having personal



knowledge of the facts recorded in the documents sought to be inspected.

Accordingly, we see no obligation for the prosecutor to obtain the institutional records for the purpose of turning them over to the defendants. The obligation, if any, of the Department of Correction to turn the records over to the defendants, even pursuant to a subpoena, presents a separate question, however, that the defendants may wish to explore on motions for new trials. General Laws c. 124, §1(j), c. 127, §§2, and 28-29, and c. 6, §§167-178, among others, may be relevant in exploring this question. Beyond suggesting it, we intimate no view as to its correct resolution.

Finally, we believe that, in considering motions for new trials, the judge himself should review the unedited version of the Carden interview to determine, based on his experience in conducting the trial, whether



relevant information was excised by the district attorney.

7. The prosecutor's summation. Near the end of his summation, the prosecutor discussed the credibility of the defense witnesses McInerney, MacDonald, and Buzowski. Concerning them, he said, "Well, those guys simply represent something that I asked you folks to make observations about at the outset as to why you think we have one prime witness and why we are so doggone fortunate to have even that one. Wasn't that a united inmate front, a united front of inmate society against you and you and everybody else in this state?" All defendants moved to strike this statement and requested an instruction that the jury disregard it, asserting that it was prejudicial and unsupported by evidence. The judge denied the motion.

In one aspect, the prosecutor's remark



about "a united inmate front" can be understood purely as an attack on credibility. As such, it was clearly warranted by the conflicting evidence on collateral issues that concerned Carden's credibility - namely, argument with Perrotta, the attempt to suborn McInerney's testimony, and the trip to Arizona. See Commonwealth v. Fitzgerald, 376 Mass. 402, 422-423 (1978), and cases cited. It was a reasonable inference from the evidence that the three inmates who testified for the defense had coordinated their testimony, and the prosecutor's restrained suggestion of this inference was not improper. Cf. Commonwealth v. MacDonald (No. 1), 368 Mass. 395, 401 (1975) (characterizing testimony as "ranked perjury that will probably ever be heard in a courtroom" questionable but not reversible error).

In another aspect, the prosector's



remark can be understood as an explanation and apology for the weakness of the Commonwealth's case. That is, the jury might have been led to think that the fear of reprisal shared by inmates prevented the Commonwealth from producing more direct proof against the defendants. The tendency of the remark to induce such thought was beyond the evidence actually introduced, for there was no direct testimony suggesting the existence of such shared fear. The jury were entitled, however, to use their common sense on the question whether inmates are likely to come forward to accuse other inmates. See Commonwealth v. Fitzgerald, supra 420; Commonwealth v. McColl, 375 Mass. 316, 323 (1978). Even in this second aspect, therefore, the prosecutor's remark cannot be considered improper.

8. Time of death testimony. Dr. Shenker's opinion as to the time of



Perrotta's death was properly admitted. A witness's qualification to render an expert opinion is a question for resolution by the trial judge, whose conclusion will not lightly be overturned. Commonwealth v. Haas, 373 Mass. 545, 563 (1977), and cases cited. A medical opinion concerning time of death is not objectionable merely because it is not based on objective scientific tests. *Id.* at 563. Commonwealth v. Russ, 232 Mass. 58, 74-75 (1919). Thus, the failure of Dr. Shenker to employ a rectal thermometer went only to the weight of his testimony and not to its admissibility.¹⁵ Finally, an expert may base an opinion in part on facts placed in evidence by other witnesses, and it is

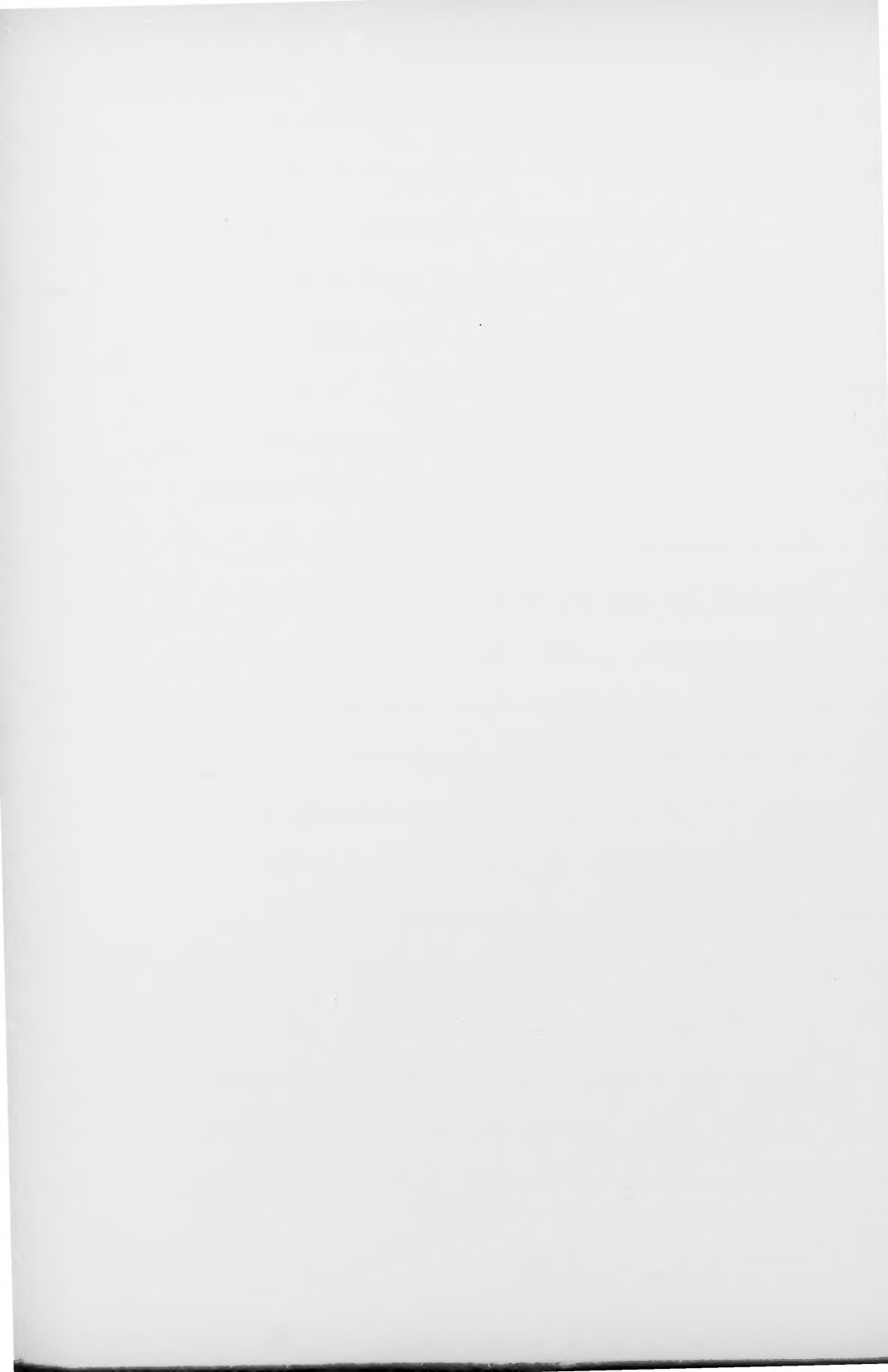
¹⁵There was testimony that a human corpse loses heat at a rate of about one and one-half degrees an hour under certain conditions. Although a rectal thermometer would have provided some objective evidence concerning the time of death, there was testimony that the estimate thus derived would be merely one factor in arriving at a medical opinion.



therefore no ground of objection that Dr. Shenker answered on the assumption that Spicer's observations were correct. See, e.g., Commonwealth v. Gilbert, 366 Mass. 18, 25 (1974); Commonwealth v. A Juvenile, 365 Mass. 421, 438 (1974).

9. Jury view. There was no abuse of discretion in denying the defendants' motions for a jury view of cell block A-2. See Commonwealth v. Curry, 368 Mass. 195, 198 (1975), and cases cited; G.L. c. 234, §35. Our review of the transcript persuades us that the jury were able to understand distances, angles, and physical layout from oral testimony given in conjunction with projected slides. See Commonwealth v. Chance, 174 Mass. 245, 247 (1899).

10. Photographs of Perrotta. The contention of Keigney and Campbell that the judge should have excluded color photographs of Perrotta's body is wholly without merit.



The photographs were relevant on the question of extreme atrocity and cruelty. See Commonwealth v. Bys, 370 Mass. 350, 357-361 (1976). They accurately portrayed the appearance and location of the body as it was when Dr. Shenker observed it. Cf. Commonwealth v. Allen, 377 Mass. 647, 678-680 (1979) (questioning admission of photographs portraying post-mortem decomposition); Commonwealth v. Richmond, 371 Mass. 563, 565-566 (1976) (error to admit picture depicting horrible post-mortem injuries).

11. Miscellaneous alleged errors. We have considered all the other alleged errors argued by the defendants and conclude that they are not sufficiently meritorious to warrant extended discussion.

a. We see no error in declining to question prospective jurors about bias formed as a result of having previously been peremptorily challenged by one of the defense



attorneys. There was no showing that any juror had been so challenged. In any event, all jurors were questioned generally about bias.

b. The mere showing that the Commonwealth interviewed a number of prison inmates does not, without more, create an obligation to tell the defense the result of the interviews or an obligation to tell the defense the results of the interviews or the names of inmates interviewed. See Weatherford v. Bursey, 429 U.S. 545, 559-561 (1977). There is no showing on this record that defense counsel attempted to learn from any other source the names of inmates present in MCI Walpole on the day of the killing or to interview any of them. The prosecutor had no obligation to act as an investigator for the defendants. These facts do not reach the point of implicating the rule of Brady v. Maryland, 373 U.S. 83, 87 (1963), requiring



the prosecution to disclose evidence favorable to the defense on request. See United States v. Agurs, 427 U.S. 97, 112 (1976); Commonwealth v. Adrey, 376 Mass. 747, 753-754, (1978), and cases cited.

c. To the extent that the judge limited or restricted the cross-examination of Officers Carr and McGuire and inmate Carden, he acted within his discretion. See, e.g., Commonwealth v. Adrey, supra at 751-753. We think the issues sought to be explored -- Perrotta's use of a door peg, the lighting conditions in the cellblock, and Carden's use of drugs -- were already before the jury with sufficient clarity.

d. The claims of alleged errors in the judge's charge are based on the lifting of certain phrases and fragments of phrases from their context in the charge as a whole. We have repeatedly said that a charge must be construed as a whole and that, in



consequence, isolated misstatements or omissions do not necessarily constitute reversible error. Commonwealth v. Watkins, 377 Mass. 385, 388 (1979). Commonwealth v. Hicks, 377 Mass. 1, 9-10 (1979). Commonwealth v. Grace, 376 Mass. 499, 500-501 (1978). None of the portions of the charge isolated by the defendants violates this test.

12. Relief under G.L. c. 278, §33E. As required by G.L. c. 278, §33E, we have carefully reviewed the entire record on the law and the evidence. We are persuaded that no miscarriage of justice occurred in this case. Accordingly, we grant no relief under §33E.

13. Conclusion. The judgments are affirmed.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NOS. 68153, 68154
68155

COMMONWEALTH

v.

ARTHUR KEIGNEY, STEPHEN DOHERTY, AND
JOHN CAMPBELL, JR.

FINDINGS OF FACT, RULINGS OF
LAW AND ORDER ON DEFENDANTS'
MOTION FOR A NEW TRIAL

BACKGROUND

In 1977, defendants Arthur Keigney, Stephen Doherty and John Campbell, Jr. were convicted of the first degree murder of fellow Walpole inmate Robert A. Perotta. At trial, the Commonwealth relied primarily on the testimony of Thomas Carden, the former brother-in-law of the victim and also a Walpole inmate. The defendants bring this motion for a new trial based on their contention that Thomas Prescott, the prosecutor in the first degree murder trial



had made an arrangement with Carden in exchange for his testimony, which led to the defendants' convictions. Additionally, the defendants argue that new evidence of a quarrel between Carden and the victim a few months before the victim's death creates grounds for granting them a new trial.

On November 28, 1984, a hearing was held pursuant to an order by Justice Wilkins of the Supreme Judicial Court to hear new factual evidence. Testimony was presented by David Powers, a social worker formerly assigned to the victim; by defendants' former attorneys, Moren, Nugent and Kaplan; by former Norfolk County Assistant District Attorney, John Prescott; by Attorney Stephen Hrones, who represented Perotta in the 1975 cases, by Attorney Wade, prosecutor in 1975 cases involving Perotta and Carden; and by Geoffrey Packard, a Massachusetts Defenders Committee attorney assigned to Essex County.



Additionally, a stipulation was filed by counsel relative to testimony of Justice Thomas Sullivan, who represented Thomas Carden in Norfolk Criminal Case No. 61726. Affidavits were submitted by U.S. Magistrate Robert B. Collins, a former prosecutor in the U.S. Attorney's office, who presented evidence from Thomas Carden and Robert Perotta to a Federal Grand Jury in 1975; and from George Vose, a former Deputy Superintendent at MCI Walpole in 1976 at the time of Perotta's murder. A transcript of Carden's testimony to the Federal Grand Jury in 1975 was appended to Collins' affidavit.

After weighing the testimony of these witnesses, as well as the above affidavits and stipulations and transcripts, the court makes the following findings of fact:

1. Thomas Carden testified on behalf of the Commonwealth in the 1977 murder trial of Keigney, Campbell and Doherty. Ten days

after the trial concluded, Attorney Prescott learned of Carden's pending Motion to Revise and Revoke. He states it was as a result of a telephone call from Attorney Thomas Sullivan, Carden's counsel in the Norfolk County cases. Subsequently, in December, 1977, Prescott participated in argument on Carden's behalf before Judge McNaught. However, Prescott claims that no promises were made to Carden earlier to induce his testimony for the Commonwealth in Commonwealth v. Keigney, and I find that none were. Sullivan has no memory of the telephone call with Prescott but states "he may have mentioned the filing of the motion to Prescott."

2. Prior to the conclusion of Commonwealth v. Keigney, Attorney Prescott heard that Carden and Perotta had been called to testify before a Federal Grand Jury concerning their involvement in a bank



robbery. Carden later told Prescott that neither he nor Perotta had testified. In fact, unbeknownst to Prescott, Perotta had testified before the Federal Grand Jury that he and Carden had participated in robbery, but the testimony occurred in March, 1975, more than a year and a half before Perotta was murdered and nearly two years before the defendants were indicted. The affidavit of Robert Collins states that Carden also testified at that same Grand Jury and that each (Perotta and Carden) gave testimony implicating themselves as well as each other in each of three robberies. I find that at that time, neither Carden nor Perotta exhibited any hostility toward each other.

3. During 1976, social worker David Powers was assigned to the care and custody of inmates at MCI Walpole. Among these was Robert Perotta. In September or October of that year, Powers observed that Perotta had

received a black eye. Powers testified on November 28, 1984 that Perotta told him Thomas Carden had blackened his eye in a fight over Perotta's visits from a woman other than Perotta's wife, who was Carden's sister. However, Powers had no memory of sending a confidential written memo to Walpole Deputy Superintendent George Vose concerning this conversation and I find none was sent, nor did Powers mention Perotta's blackened eye in the post-mortem Detailed Social History which he prepared after Perotta's death. Moreover, according to his affidavit of November 23, 1983, Prescott had and has no knowledge of the existence of a social worker's report by Powers concerning the alleged fight. I find evidence offered by Powers not credible.

4. Defense Attorney Moren, who represented Keigney; Nugent, who represented Campbell, and Kaplan, who represented



Doherty, all testified on November 28, 1984 that in the course of the Perotta murder case they filed motions for exculpatory evidence. No evidence relating to a deal between Carden and Prescott was ever produced, and I find that there was no such agreement.

5. Geoffrey Packard, the Massachusetts Defenders Committee attorney assigned to Essex County, testified that Attorney Prescott informed him of the existence of Carden's Motion to Revise and Revoke in late 1977. Prescott also told Packard he would appear for the Commonwealth on behalf of Carden's motion, since Carden had been valuable prosecution witness in Commonwealth v. Keigney. However, Prescott expressed to Packard that Carden's motion, which had been filed long before Perotta's murder, was still outstanding.

RULINGS OF LAW

The defendants bring this motion for a

new trial based on two discrete pieces of newly discovered evidence - the alleged fistfight between Perotta and Carden and Carden's secret testimony before the Federal Grand Jury. The defendants contend that the fight was evidence of Carden's hostility towards Perotta and thus is exculpatory with respect to them. Additionally, the defendants cite Perotta's 1975 secret Grand Jury testimony as exculpatory evidence unavailable to them at the time of trial.

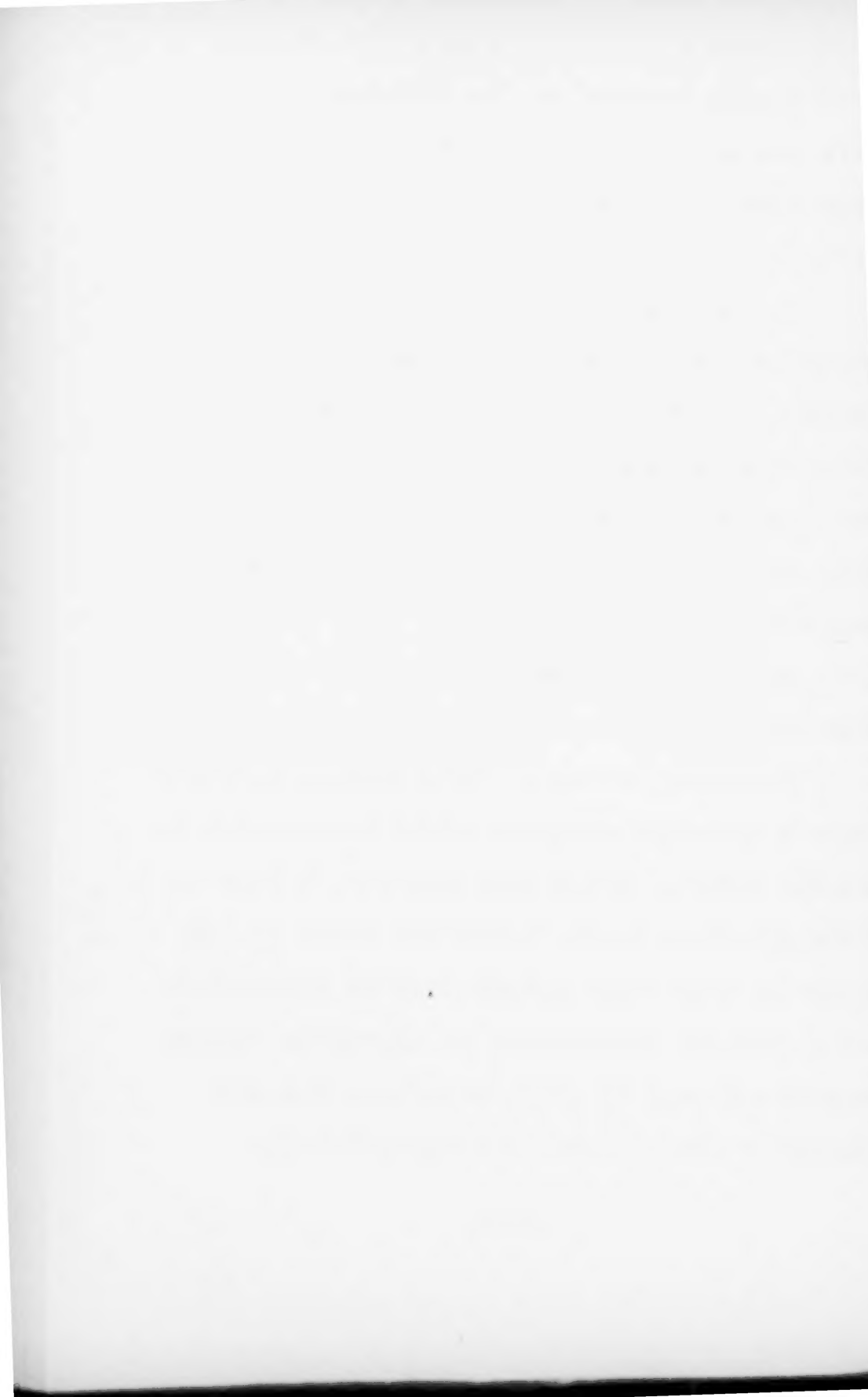
It is well established that the policy against granting a new trial on the grounds of newly discovery evidence is especially strong. Commonwealth v. Woods, 382 Mass. 1 (1980). The new evidence must be weighty and so credible, potent and pertinent to fundamental issues in the case as to be worthy of careful consideration. Id. The question before a judge is therefore whether the new evidence creates a substantial risk

that a jury exposed to the evidence would have reached a different result.

Commonwealth v. Markham, 10 Mass.App. 651 (1980).

I find that the newly discovered evidence concerning the alleged fight between Carden and Perotta, as well as evidence of Perotta's Federal Grand Jury testimony, do not create grounds for a new trial, since even taken together, the evidence is too scant to create a substantial risk that the jury would have reached a different result had they heard the evidence.

Moreover, since it is extremely unlikely that a district attorney would have access to secret Federal Grand Jury records, I find that Attorney Prescott was not aware at the time of trial that Robert Perotta cooperated with federal authorities by appearing before the Grand Jury in 1975 concerning his and Carden's involvement in a bank robbery.



I further find that Prescott was unaware at the time of trial that Thomas Carden had filed a Motion to Revise and Revoke which was pending at the time of the trial of Commonwealth v. Keigney. To obtain a new trial because of an undisclosed promise, it is not enough to show that a witness may have had a "hopeful expectation" of favorable treatment. United States v. Baskes, 649 F.2d 471, 476 (7th Cir. 1980). Rather, the defendants must show a "promise of aid made by the Government to a key witness that was not disclosed to the jury." United States v. Ramos, 584 F.2d 562, 564 (1st Cir. 1978). I find no evidence that Attorney Prescott made any such promises to Carden of favorable treatment in exchange for his testimony on behalf of the Commonwealth. Thus, since Prescott did not learn of Carden's Motion to Revise and Revoke until after the conclusion of the trial of Commonwealth v. Keigney, he

could not possibly have made an undisclosed prior promise, agreement or inducement to Carden to obtain his testimony. This is well demonstrated both by Prescott's uncontradicted affidavit of November 23, 1983 and his testimony at the November 28, 1984 hearing. Finally, Prescott's support of Carden's Motion can be explained by Carden's willingness to risk his life and give truthful testimony against fellow inmates in an extraordinary brutal murder case.

ORDER

It is therefore Ordered that the defendants' Motion for a New Trial be Denied.

Francis W. Keating
Justice of Superior Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 84-167

COMMONWEALTH OF MASSACHUSETTS

v.

STEPHEN J. DOHERTY, JOHN CAMPBELL
and ARTHUR KEIGNEY

MEMORANDUM OF DECISION

The defendants seek leave of a single justice, pursuant to G.L. c. 278, §33E, for leave to appeal from the denial of their motion for a new trial. In September, 1984, I concluded that the motion for a new trial should not have been ruled on without an evidentiary hearing, even though the defendants' then counsel urged the judge to pass on the motion based on what was before him.

The defendants' convictions were affirmed by the full court in 1979.

Commonwealth v. Campbell, 378 Mass. 680

(1979). An earlier motion for a new trial was denied by the trial judge in 1981, and thereafter I denied the defendants' application for leave to appeal from the denial of that earlier motion.

The question under §33E is whether the defendants seek to raise on appeal any issue that is both new and substantial. I am not to decide whether the court would in all likelihood affirm the denial of the new trial motion. The defendants need only show that they have one or more issues that are substantial and new. I regard the requirement of "newness" to mean that the issue could not reasonably have been raised or discovered before. The only issue that clearly does not pass the newness test is the claim, discussed below, that the prosecutor should have disclosed to trial counsel the disposition of Suffolk County charges against the prosecution's principal witness. I

conclude that none of the issues raised passes the substantiality test and, thus, leave to appeal is denied.

The issues argued by conscientious counsel for the defendants concern matters that it is argued should have made available to defense counsel so they could be brought out in the cross-examination of the crucial witness against the defendants, one Carden. Although the motion judge did not deal with every issue argued here, he basically concluded that there was no showing of manifest injustice warranting a new trial.

Promises and Inducements. The crucial factual determination made by the judge was that there was no deal between Carden and the prosecutor for Carden's testimony. This is the principal contention of the defendants, followed by the argument that the prosecutor had a duty to disclose the deal to defense counsel and to be certain that in his



testimony Carden did not lie about the prosecutor's promises and inducements.

The judge's findings were fully warranted on the evidence before him. He was not compelled to draw an inference of promises to Carden, concerning reductions in his sentence, from the fact that shortly following the trial, the prosecutor argued in favor of a reduction in Carden's 20-30 year sentence at a hearing on Carden's motion to revise and revoke that sentence. Nor is there any basis for an appellate court to engage in independent fact finding on this issue.

The question then is whether the prosecutor had an obligation to disclose anything else and, if so, whether any nondisclosure raises a substantial issue for appellate consideration.

The 1977 Suffolk County Sentences.

Exhibit 6 in the hearing on the motion for a



new trial is Carden's probation record. It is unclear as of what date the record was prepared. It is not clear whether it is the probation record given to defense counsel at or prior to trial. It shows the fact of the February, 1977 disposition of the Suffolk County charges. That same report shows the 20-30 year sentence imposed in April, 1975. Thus the concurrent sentence given in 1977, after the charges against the defendants were pending, was apparent on the face of the record or subject to disclosure on cross-examination by defense counsel and thus open to scrutiny by counsel on cross-examination, by independent investigation, or otherwise.

In any event, there was no showing of an obligation on the prosecution to disclose more than was disclosed to defense counsel concerning the Suffolk County charges.

As an aside on the question whether there was a deal, I comment that I have no



sense that in February of 1977, when Carden was sentenced on the Suffolk charges by Judge Travers, the judge believed that there was a "deal" between Carden and the prosecution concerning his testimony. It was then known that Carden had decided to cooperate in the case against the defendants. Carden's counsel argued for sentences concurrent with the one he was then serving. The judge suggested seven to eight years and asked whether that would interfere. I think that reference is clearly to the question whether defense counsel agreed that such a sentence would not interfere with the sentence being concurrent.

The Pending Motion to Revise and Revoke.

It appears uncontroverted that at that time of the defendants' trial Carden had pending a motion to revise and revoke his 20-30 year Norfolk County sentence for armed robbery while masked, imposed in April, 1975. Carden



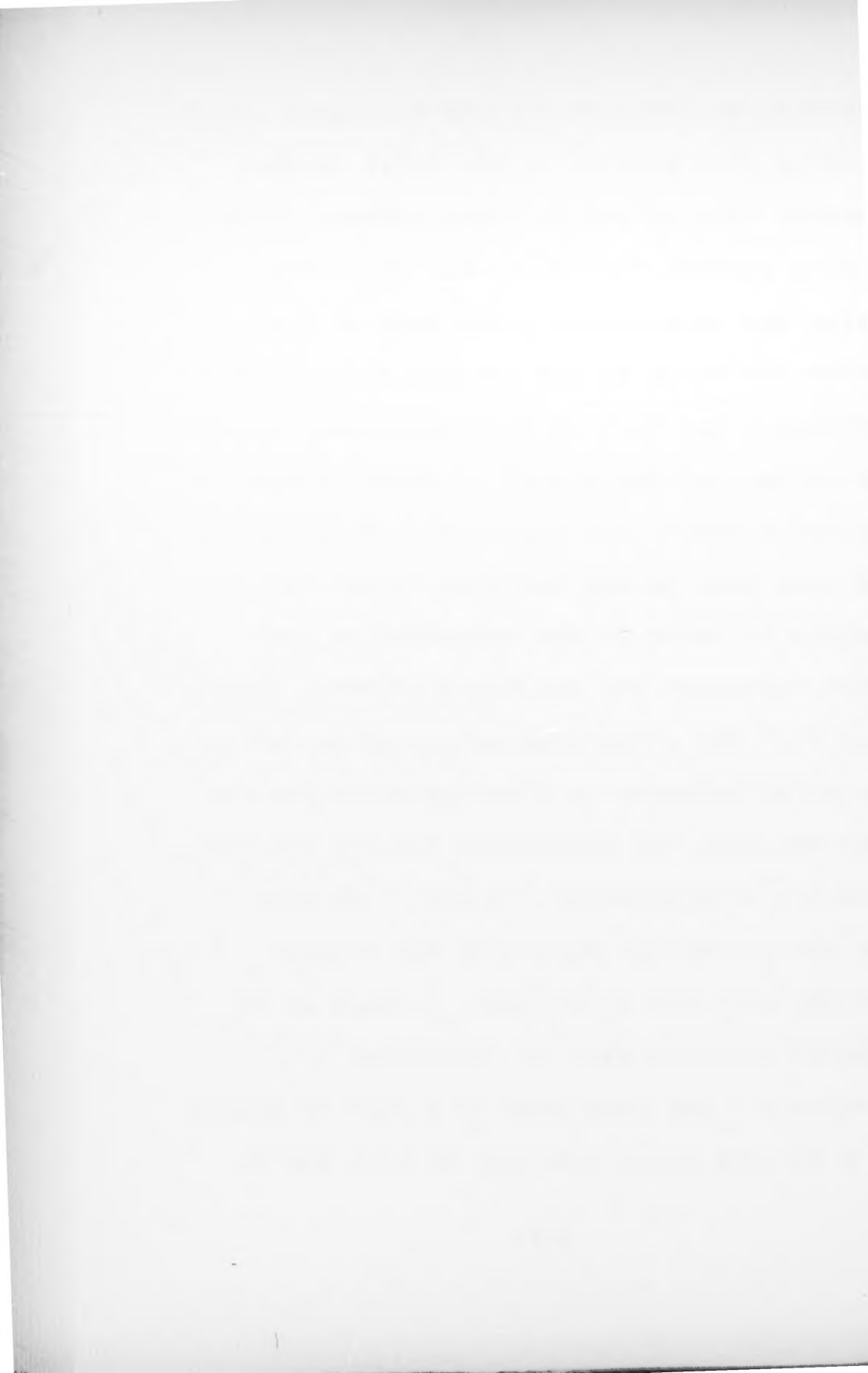
was aware of it or at least had notice of the motion's filing. The prosecutor was not aware of the pendency of the motion.

However, the Norfolk District Attorney's office as aware of it, in the sense that notice of the filing of the motion was given to that office and its records (and court records) would show that the motion was still pending. It is unclear on the record whether defense counsel could have ascertained that the motion to revise and revoke was still pending.

One may assume (without deciding) that the prosecutor should be held to have knowledge of the pendency of the motion (particularly because the matter was in his own county) and one may assume the doubtful proposition (again without deciding) that defense counsel did not already have enough information to put them on inquiry as to the pendency of a motion to revise and revoke.



Nevertheless, the issue lacks substance (even if it is new) because at the trial Carden conceded that he had an armed robbery charge pending against him (Tr. 5-61, 77). The charge was substantially the same as the charge for which he was serving a 20-30 year sentence. The fact is that apparently there was no pending undisposed of State charge against Carden. The opportunity to argue to the jury that Carden had good reason to testify in favor of the Commonwealth was there (although for the wrong reason). It is true that the cross-examination of Carden by Mr. Moren referred to a non-existent pending case and that the prosecutor did not correct Carden's misstatements (if any). However, any misinformation disclosed was wholly favorable to the defendants, opening up an area of possible bias not otherwise available. The existence of a pending charge of a serious crime provides an even better



argument for bias than disposed of charges. Commonwealth v. Connor, 392 Mass. 838, 841 (1984). The error, if there was one, was insubstantial.

As the full court noted when the defendants' appeals were before it, the evidence against the defendants was somewhat thin (especially as to Doherty).

Commonwealth v. Campbell, 378 Mass. at 688.

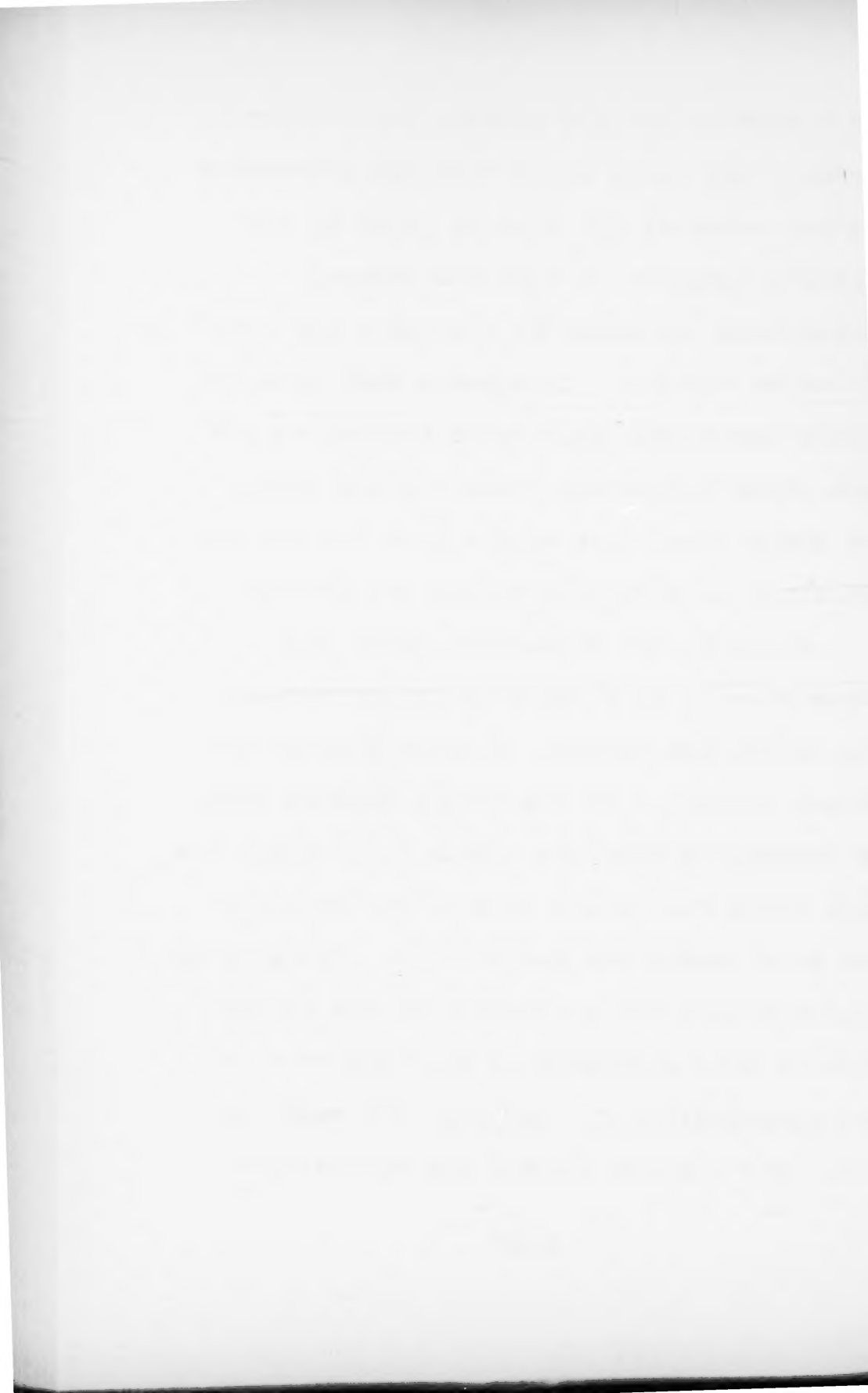
I have, therefore, given special attention to whether the jury could have been affected adversely to the defendants by the circumstances relating to the pending motion to revise and revoke and have discovered no reasonable basis for concluding that there is a substantial issue presented for appellate consideration on this point.

Other matters. The defendants further claim that the prosecutor intentionally suppressed the fact that the victim had appeared before a Federal grand jury a year



and a half before his murder, implicating Carden. The judge found that the prosecutor was not aware at the time of trial of the victim's cooperation with the Federal authorities, although he knew they had been called to testify. It appears that both the victim and Carden implicated themselves and each other before the Federal grand jury. The judge found that at the time the two men exhibited no hostility toward one another.

Finally, the defendants press the importance of an alleged fistfight between the victim and Carden. A counsellor at the prison testified at the motion hearing that he remembered that the victim had a black eye some weeks before his murder, for which he had said Carden was responsible. There is no evidence that the prosecutor or the police knew of this statement at the time of trial. See Commonwealth v. Campbell, 378 Mass. at 702. The witness himself did not believe



that Carden caused the victim's black eye. The judge was fully warranted in concluding that there was nothing of substance in the counsellor's testimony. I agree. In any event, there was no showing to the motion judge of a duty to disclose.

Conclusion. Judgment shall be entered denying the application for leave to appeal the denial of the defendants' motion for a new trial

September 12, 1985

Herbert P. Wilkins
Associate Justice

A true copy,

Attest:

Clerk

September 13, 1985



UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN CAMPBELL, Petitioner

Civil Action
No. 86-2416-MA

Vs.

MICHAEL FAIR, Respondent

STEPHEN DOHERTY, Petitioner

Civil Action
No. 86-2417-MA

Vs.

MICHAEL FAIR, Respondent

ARTHUR KEIGNEY, Petitioner

Civil Action
No. 86-2418-MA

Vs.

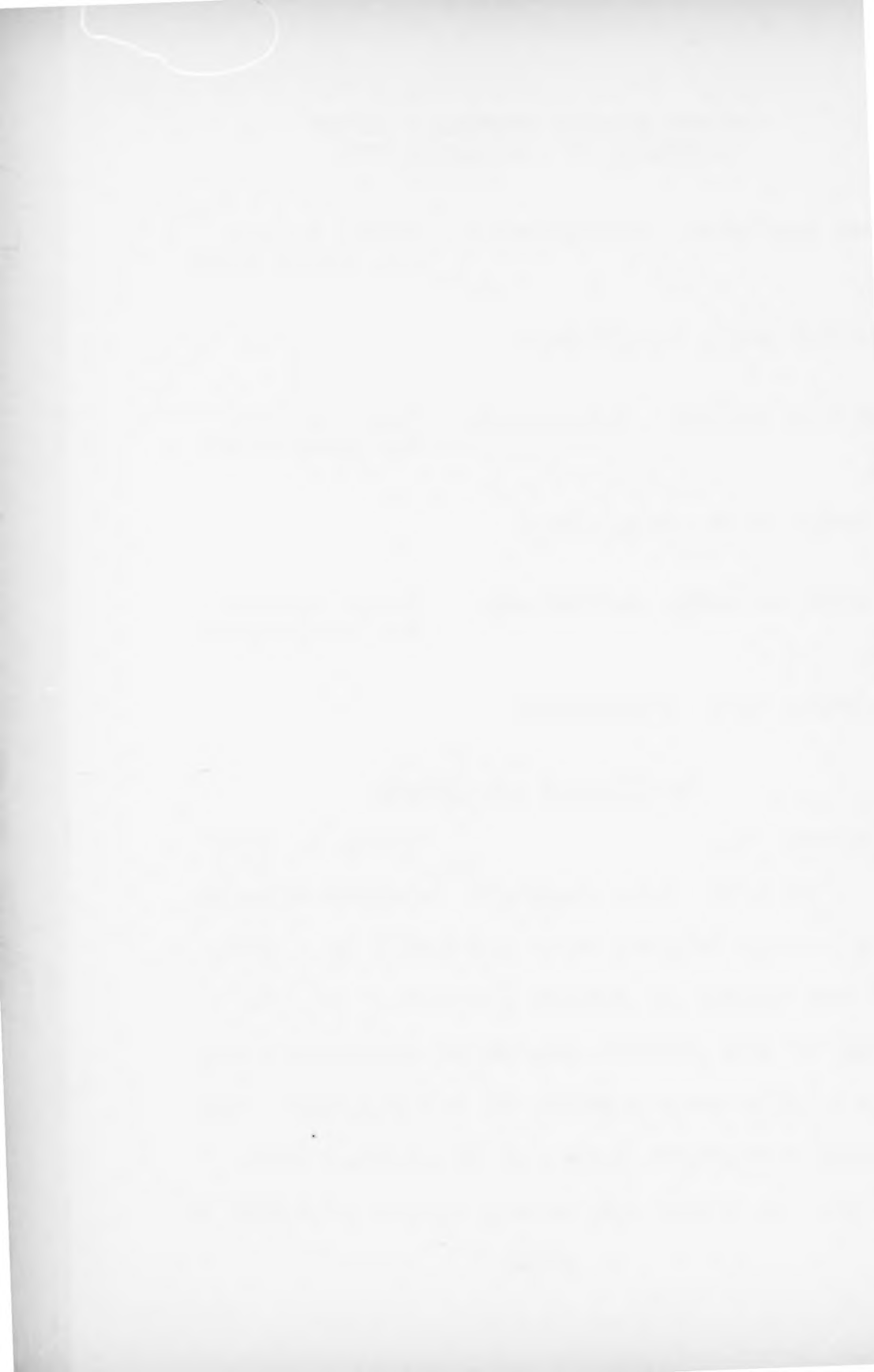
MICHAEL FAIR, Respondent

MEMORANDUM AND ORDER

Mazzone, D.J.

March 5, 1987

In 1977, John Campbell, Stephen Doherty, and Arthur Keigney were convicted by a jury of the murder of Robert Perrotta. At the time of the murder, the three defendants and the victim were inmates at MCI-Walpole. All three defendants have now petitioned this Court for a writ of habeas corpus pursuant to



28 U.S.C. §2254. They claim that they are entitled to new trials because certain information was not made available to defense counsel before or during the trial. This information, the petitioners argue, could have been used to attack the credibility of Thomas Carden, a fellow inmate who was the crucial government witness against them.

The petitioners first presented this argument to a judge of the state Superior Court, who heard and denied their motion for a new trial. A single justice of the Supreme Judicial Court then denied their application for leave to appeal the denial of their motion, finding that they did not raise any substantial issues. The defendants' petition to appeal that decision was then dismissed as not appealable. They now seek redress in the federal courts. In addition to the claim discussed above, petitioner Stephen Doherty also brings a claim presented to the state



courts during an earlier round of appeals; namely, he alleges that the evidence was insufficient to support the guilty verdict against him.

The government has moved to dismiss the petitions, alleging that they fail to state a claim upon which relief can be granted and that the petitioners have not exhausted their state remedies. I limit my consideration to the first point raised by the government, as both the government's brief in support of its motion and the petitioners' opposition to the motion address only whether the petitions state a claim.

I. Standard of Review

An application for a writ of habeas corpus by a person in custody pursuant to a state court judgment can be entertained by a federal court only on the ground that the petitioner is "in custody in violation of the Constitution or laws or treaties of the



United States." 28 U.S.C. §2254(a). Success in habeas must "necessarily rest on the presence of error of constitutional magnitude." Sawyer v. Mullaney, 510 F.2d 1220, 1221 (1st Cir. 1975).

In determining whether a constitutional error has been committed, the habeas court is limited in its assessment of the state court's factual findings by the provisions of 28 U.S.C. §2254. That section provides that "a determination after a hearing on the merits of a factual issue, made by a State court . . . [and] evidenced by a written finding [or] written opinion . . . shall be presumed to be correct" unless one of eight specified conditions is found to exist by the federal habeas court. The last of the eight exceptions of this presumption of correctness, and the one relied upon by the petitioners here, is where the federal habeas court concludes that the state court factual



determination "is not fairly supported by the record." 28 U.S.C. §2254(d)(8). See Marshall v. Lonberger, 459 U.S. 422, 432 (1983). Section 2254 also provides that the petitioners may be entitled to relief even if none of the specified conditions is found to exist. Unless the habeas court concludes that the relevant state court determination is not fairly supported by the record, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. §2254(d). See Sumner v. Mata, 449 U.S. 539, 550 (1981).

With this presumption of correctness and its attendant exceptions in mind, I now turn to the merits of the petitioners' claims.

II. Alleged Constitutional Violations

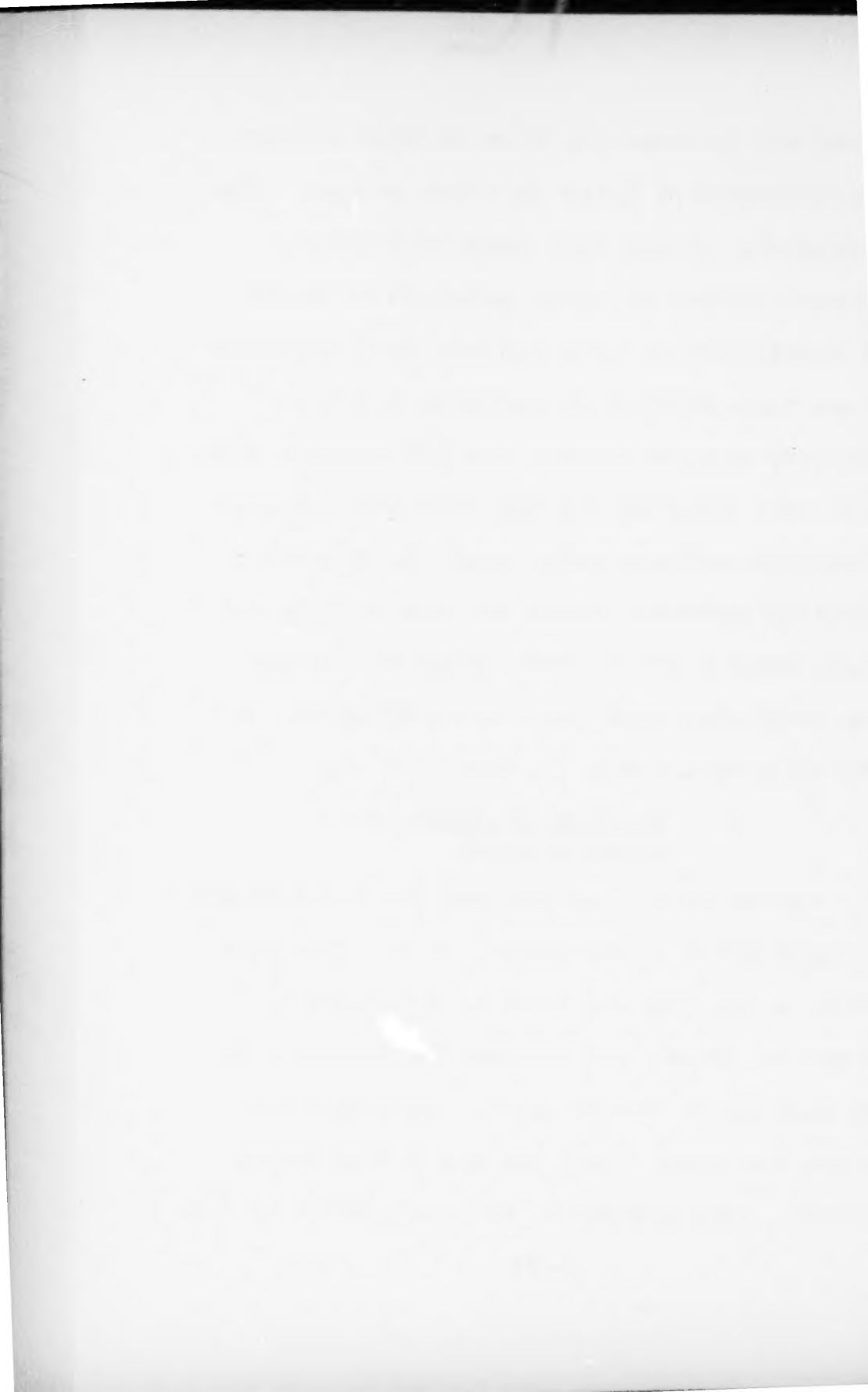
The petitioners claim that their efforts to cross-examine Carden to impeach his credibility were stymied by the withholding



of certain information from defense counsel. This information falls into two groups. The petitioners allege that they were not informed Carden had been promised or hoped for consideration with respect to a sentence he was then serving in exchange for his testimony against them. The petitioners also claim that defense counsel were not informed of certain matters which might have shown animosity between Carden and the victim and established a motive for Carden to lie to keep suspicion from falling on himself. I deal with each claim in turn.

1. Promise or Hopes of Consideration

Carden testified against the petitioners at their trial in November, 1977. The next month, a hearing was held on a motion by Carden to revoke and revise the sentence he was serving at MCI-Walpole. Although the motion had been filed two and a half years earlier, John Prescott, the prosecutor in the



Perrotta murder case, claims he did not learn of it until shortly after the trial had ended. The prosecutor then appeared at the hearing and argued in favor of revoking Carden's 20-30 year sentence and revising it to 9-10 years in light of Carden's courage in testifying against his fellow inmates. The judge followed the recommendation of the prosecutor.

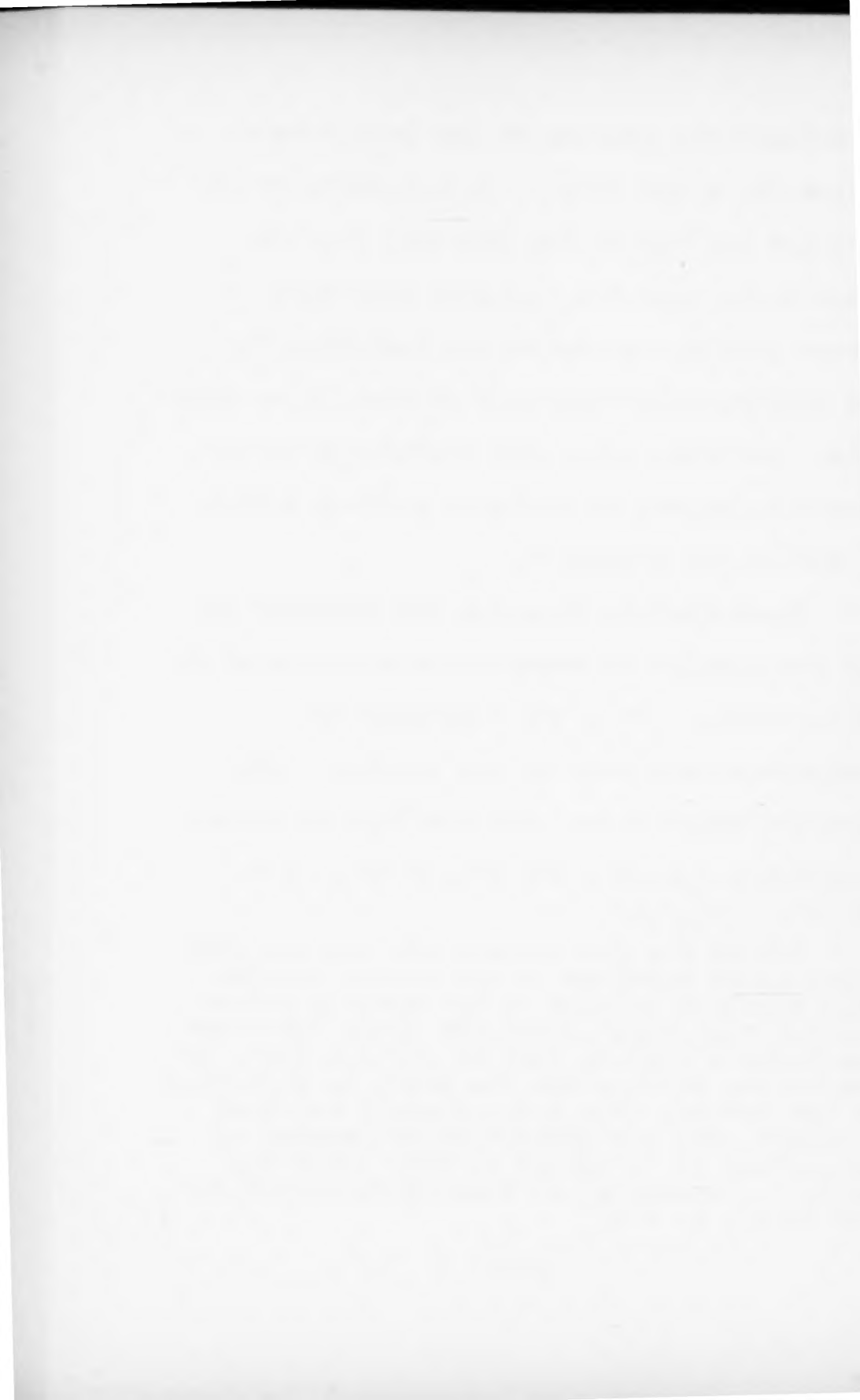
The petitioners claim that the prosecutor promised Carden he would argue in favor of the motion in exchange for his testimony. Defense counsel were not aware that Carden had this motion pending when he testified against the petitioners. They claim that had trial counsel known of it, they could have attacked Carden's credibility by showing the existence of an arrangement and establishing a motive to lie.

The judge in the Superior Court considered and rejected this argument after

an evidentiary hearing on the petitioners' motion for a new trial. In his Findings of Fact and Rulings of Law (Exhibit D), the judge found that "no promises were made to Carden earlier to induce his testimony for the Commonwealth" and that it was "[t]en days after the trial concluded [before] Attorney Prescott learned of Carden's pending Motion to Revise and Revoke."¹

These factual findings are entitled to the presumption of correctness established by Section 2254. They are supported by Prescott's testimony at the hearing. The Superior Court judge, who was able to assess Prescott's demeanor and credibility, was

¹While the petitioners are correct that there is no evidence in the record showing that Prescott learned of the pending motion exactly "ten days" after the trial concluded, the judge's finding that he did not learn of the motion until after the trial is supported by the record. The judge clearly believed Prescott, who testified that he learned of the motion in "a matter of days after the trial." Transcript of Hearing on Motion for New Trial, p. 106.



entitled to believe Prescott instead of drawing the inference of an arrangement urged by the defense counsel from the fact that shortly after the trial, Prescott argued in favor of the sentence reduction and told the judge that he would have done so regardless of the outcome of the prosecution.² The petitioners have also not met their burden of showing by convincing evidence that the factual determination of the state court was

²The petitioners also claim that the inference of a deal could be drawn from a certain colloquy between Carden's counsel and Judge Travers, who sentenced Carden on certain charges stemming from a jail break. The sentencing occurred after he had agreed to cooperate with the government, but before the petitioners' trial. During the colloquy, Carden's counsel asked for sentences concurrent with the one he was then serving. The judge asked whether seven to eight years would interfere. That question in no way implies that the judge understood that the prosecution would later support Carden's motion to revoke and revise and that he did not want the 7-8 year sentence to interfere with the future revised sentence. Rather, the only inference which can be drawn is that the judge was merely ascertaining whether the sentence he was imposing would interfere with the sentence being concurrent.



erroneous, for they have presented no evidence which shows that an arrangement was in fact made for Carden's testimony.

The petitioners also argue that even if a deal was made between the prosecutor and Carden, defense counsel could still have impeached Carden's credibility by showing that he testified favorably for the government in the hopes of receiving consideration regarding his motion to revoke and revise. Prescott thus should have discovered and notified defense counsel of the pending motion. It is true that Prescott's office did have notice of the pendency of the motion because Carden's counsel notified the office when he filed it in 1975. Yet Prescott's failure to discover the existence of the motion and to notify defense counsel does not constitute constitutional error, for defense counsel were nonetheless presented with the



opportunity to impeach Carden's credibility. During cross-examination by one of the defense counsel, Carden agreed with counsel that he still had some armed robbery charge pending, when in fact all charges against him had been disposed of before the trial. I agree with the assessment of the single justice that "[t]he opportunity to argue to the judge that Carden had good reasons to testify in favor of the Commonwealth was there (although for the wrong reason)." (Memorandum of Decision, p. 5).

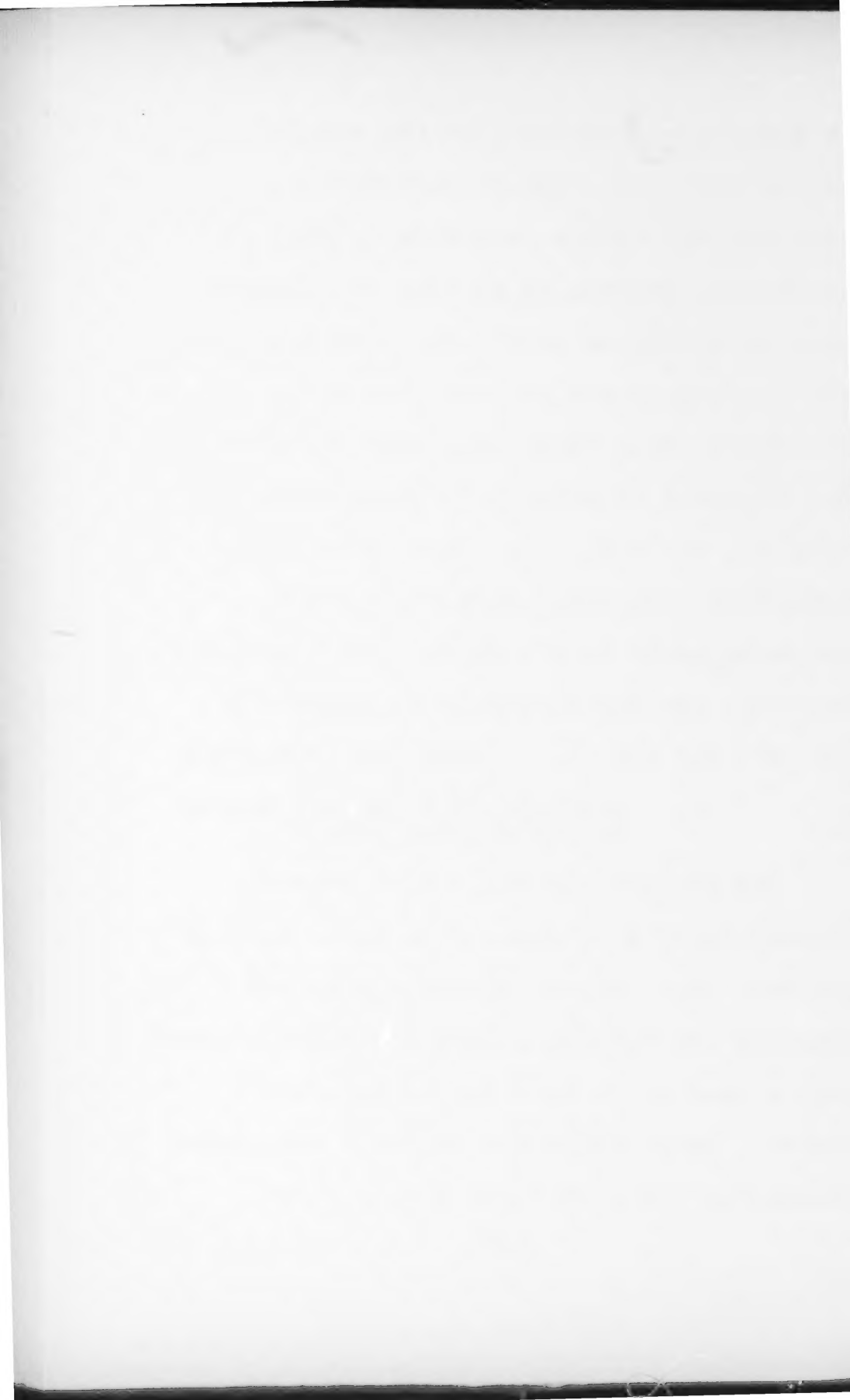
The petitioners additionally argue that Prescott committed error by failing to correct Carden's misstatement about the disposition of the charges. The petitioners claim Carden lied to hide the fact that he had received favorable treatment in the disposition of the charges, thereby depriving defendants of the opportunity to argue to the jury that Carden's testimony was prompted by



his gratitude. However, as the single justice observed, "any misinformation disclosed was wholly favorable to the defendants, opening up an area of possible basis no otherwise available. The existence of a pending charge of a serious crime provides an even better argument for bias than disposed of charges." (Memorandum of Decision, pp. 5-6). As there is not reasonable likelihood that the "false" testimony could have affected the judgment of the jury, see United States v. Agurs, 427 U.S. 97, 103 (1976), no error was committed.

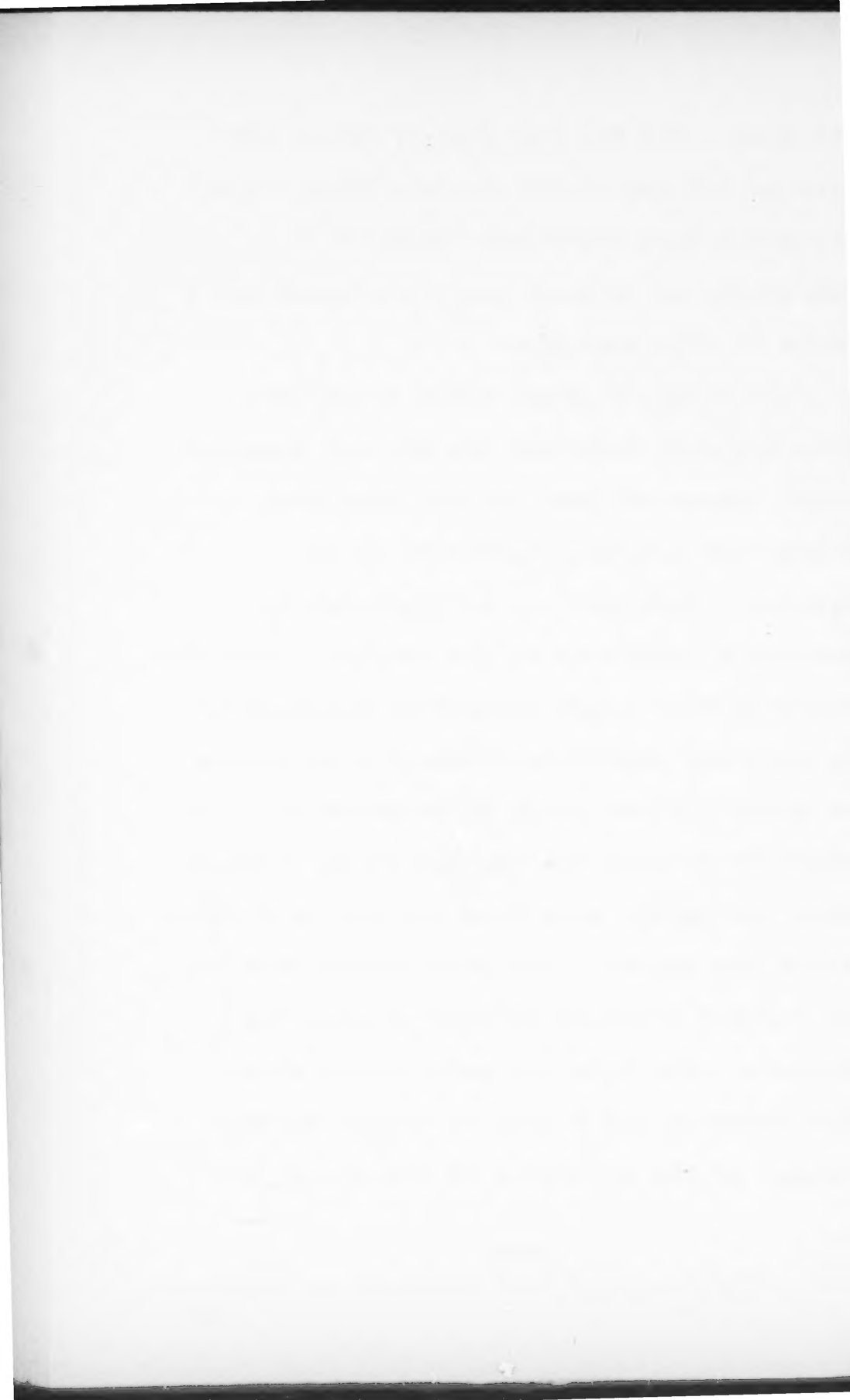
2. Evidence of Animosity Between Carden and the Victim

The petitioners claim that Prescott intentionally suppressed from their counsel the fact that Carden and the victim had appeared and testified before a federal grand jury a year and a half before Perrotta's murder. Both Carden and Perrotta implicated themselves and each other during their



testimony. Had the petitioners known that Perrotta had implicated Carden, they argue they would have impeached Carden's credibility by showing that he himself had a motive to kill Perrotta.

The Superior Court judge found that while Prescott knew the two men had appeared before the grand jury, he believed that neither had actually testified as to anything. This finding is supported by Prescott's testimony at the hearing. And the petitioners have put forward no evidence to the contrary regarding Prescott's knowledge. The judge further found no evidence of hostility between the two men at the time of their testimony, more than one and half years before the murder. The petitioners have not put forward evidence tending to show the contrary. Nor have the petitioners shown that Prescott had a duty to inform defense counsel of the existence of the grand jury



transcripts when he did not believe that either man had testified.

The petitioners' final argument is that newly discovered evidence demonstrates that justice may not have been done. David Powers, a social worker assigned to work at MCI-Walpole, testified at the hearing on the motion for a new trial that he saw Perrotta with a black eye several weeks before his murder. Perrotta told him that it was Carden who had blackened his eye in a fight over Perrotta's visits from a woman other than his ex-wife, who was Carden's sister. The petitioners suggest that the prosecution may have suppressed this information and that this newly discovered evidence of animosity between the two men warrants a new trial.

In his testimony, Powers said he did not mention the black eye in the detailed social history report he prepared after Perrotta's death. While his standard operating

procedure would have been to write a confidential memorandum containing this "intelligence" information to the institutions's deputy superintendent. Powers had no memory of actually doing so. The judge's finding that no memo had ever been sent is supported by Power's testimony and by the prosecutor's affidavit, which states that he had no knowledge of a social worker's report by Powers concerning the alleged fight. The petitioners have advanced no evidence showing that this finding is erroneous or supporting their suggesting that the prosecution intentionally suppressed any information. As Powers also testified that he believed Perrotta and Carden were good friends and he himself did not believe that Carden was responsible for the black eye, the judge was also warranted in finding that the Powers evidence about the alleged fight was neither credible nor substantial. Having

presided over the original trial, the judge was particularly qualified to weigh the probative effect of that evidence. See Grace v. Butterworth, 586 F.2d 878, 881 (1st Cir. 1978).

III. Sufficiency of the Evidence

Petitioner Doherty also claims that the evidence was insufficient to support the guilty verdict against him. This claim was brought in and considered by the state courts before the petitioners brought their most recent motion for a new trial.

Both the government and the petitioners agree that the standard of review for Doherty's claim is governed by Jackson v. Virginia, 443 U.S. 307, 324 (1979), which states that habeas corpus relief is appropriate "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." In

reviewing the denial of Doherty's motion for a directed verdict, the Supreme Judicial Court applied this standard. See Commonwealth v. Campbell, 378 Mass. 680, 686 (1979) ("[W]e determine whether the evidence . . . was sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged.") The Supreme Judicial Court carefully examined the evidence against Doherty and concluded that it was sufficient to support the guilty verdict. I agree with that Court's analysis. See Commonwealth v. Campbell, 378 Mass. at 688-690.

Conclusion

In accordance with the above, the Commonwealth's motion to dismiss the petitions is allowed.

SO ORDERED.

United States District Judge



UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN CAMPBELL, Petitioner

Civil Action

No. 86-2416-MA

Vs.

MICHAEL FAIR, Respondent

STEPHEN DOHERTY, Petitioner

Civil Action

No. 86-2417-MA

Vs.

MICHAEL FAIR, Respondent

ARTHUR KEIGNEY, Petitioner

Civil Action

No. 86-2418-MA

Vs.

MICHAEL FAIR, Respondent

ORDER OF DISMISSAL

MAZZONE, D.J.

In accordance with the Court's memorandum and order dated March 5, 1987 granting the respondent's motion to dismiss, it is hereby ORDERED that the above entitled actions be and hereby are dismissed.

By the Court,

March 9, 1987

Deputy Clerk



JOHN CAMPBELL, JR., et al.
Petitioners, Appellants,

v.

MICHAEL V. FAIR, Commissioner of
Correction, Respondent, Appellee.

No. 87-1311

United States Court of Appeals,
First Circuit.

Heard Oct. 6, 1987.

Decided Jan. 26, 1988.

Anthony M. Cardinale, with whom Robert L. Sheketoff and Zalkind, Sheketoff, Homan, Rodriguez & Lunt, Boston, Mass., were on brief, for petitioners.

William A. Gottlieb, Asst. Atty. Gen., Crim. Bureau, with whom James M. Shannon, Att. Gen., and A. John Pappalardo, Deputy Atty. Gen., Chief, Crim. Bureau, Boston, Mass., were on brief for respondent.

Before COFFIN, Circuit Judge, BROWN, Senior Circuit Judge, and TORRUELLA, Circuit Judge.

TORRUELLA, Circuit Judge.

We review here the district court's denial of Campbell, Keigney and Doherty's petitions for writs of habeas corpus. They argue before us that their constitutional rights were violated because the prosecution in state courts knowingly relied on perjured testimony and failed to disclose impeaching testimony. Doherty also claims the evidence was insufficient to sustain his conviction.

Campbell, Keigney and Doherty, all inmates of MCI-Walpole, were indicted on February 3, 1977, in Norfolk County, Massachusetts, for the murder of Robert Perrotta, who also was an inmate at MCI-Walpole at that time. They were tried, and a jury returned verdicts of first degree murder. The convictions were affirmed by the Supreme Judicial Court (SJC), in Commonwealth v. Campbell, 378 Mass. 680, 393 N.E.2d 820 (1979).



The defendants filed a motion for new trial in 1984, which was denied after an evidentiary hearing. The Honorable Justice Wilkins, in his capacity as a single justice of the SJC, denied their motion for leave to appeal the denial of new trial. Defendants subsequently filed petitioner for writs of habeas corpus in the United States District Court. Judge Mazzone of the District of Massachusetts issued a Memorandum and Order on March 5, 1987, dismissing their petitions. The case now comes before us on appeal.

Appellants' two legal arguments concern distinct sets of facts, which will be explored more fully in the analysis of each argument; the first issue makes relevant the facts concerning the impeachability of the prosecution's star witness, while the second requires perusal of the evidence establishing appellant Doherty's role in the murder.

I.

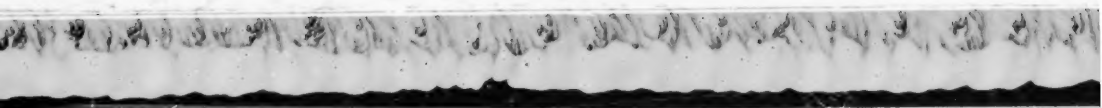
We will examine first whether the trial was constitutionally tainted by a lack of opportunity to explore the impeachability of the principal eyewitness against the petitioners. Thomas Carden was the only witness who could connect the petitioners with the murder. He had been the brother-in-law of the victim and was his close friend. He was also an inmate at Walpole at the time of the murder, and the first inmate in the history of that institution to testify for the prosecution in an inmate murder case.

His impeachability stems from the favorable resolution of some legal matters affecting him. At the time he testified, he was serving a twenty- to thirty-year sentence. The prosecution to some extent held out that lengthy sentence as insurance against any expectation of favorable treatment Carden may have had in exchange for



his testimony. Unbeknownst to any of the parties, however, Carden's attorney had recently filed a motion to revise and revoke that sentence. Thirty days after trial, the prosecutor testified on Carden's behalf in that motion, with the result that his sentence was reduced to eleven years. This reduction made Carden eligible for parole at the end of a federal sentence he was serving concurrently, rather than several years later.

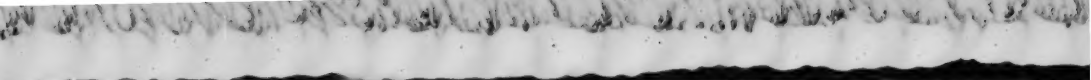
Another conviction is also relevant. Between the time when he began to cooperate with the prosecution and the time of trial, Carden pleaded guilty to bank robbery. The prosecutor in that case made no sentencing recommendation, and the judge imposed a sentence that did not interfere with Carden's federal parole eligibility date. In a confused passage of the transcript, Carden arguably states that that case is still



pending. That same passage is subject to the interpretation that the witness was referring to the motion to revise and revoke mentioned above, or to a different case altogether. Although petitioners now argue that Carden lied and the prosecutor failed to correct him, neither the prosecutor nor defense counsel found anything odd in Carden's answers, and no attempt was made to correct or clarify any answers.

The final, crucial fact to note on this point is that in an evidentiary hearing on a motion for new trial, and after considering the testimony of all relevant persons, the trial court explicitly found that the prosecutor had made no promises to Carden, and had no knowledge of the motions to revise and revoke when he conducted petitioners' trial.

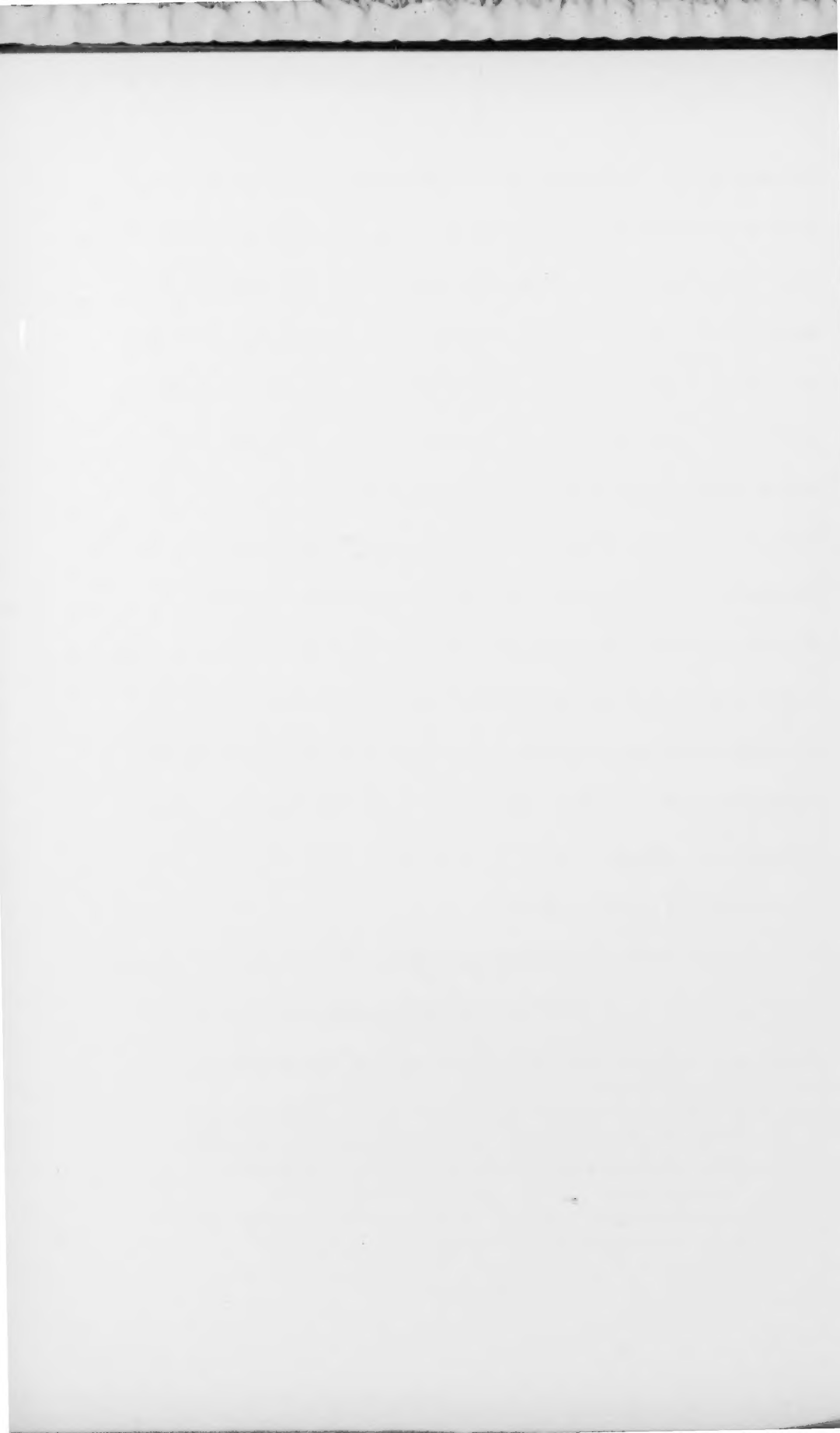
[1] In their argument, however, petitioners repeatedly claim that the



prosecutor "failed to disclose promises to a key witness," and then bring to our attention the Supreme Court's disapproval of such actions. See, e.g., Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). At the same time, they failed to note the strictures imposed on us by 28 U.S.C. §2254 when reviewing a state court's factual findings. We must presume these findings to be correct with the burden on the applicant to establish the contrary by convincing evidence, unless one of the eight exceptions listed in §2254(d) applies. See Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982).

The only exception that is relevant here is the one set forth in subsection (d)(8):
factual findings are not to be disturbed

[u]nless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such

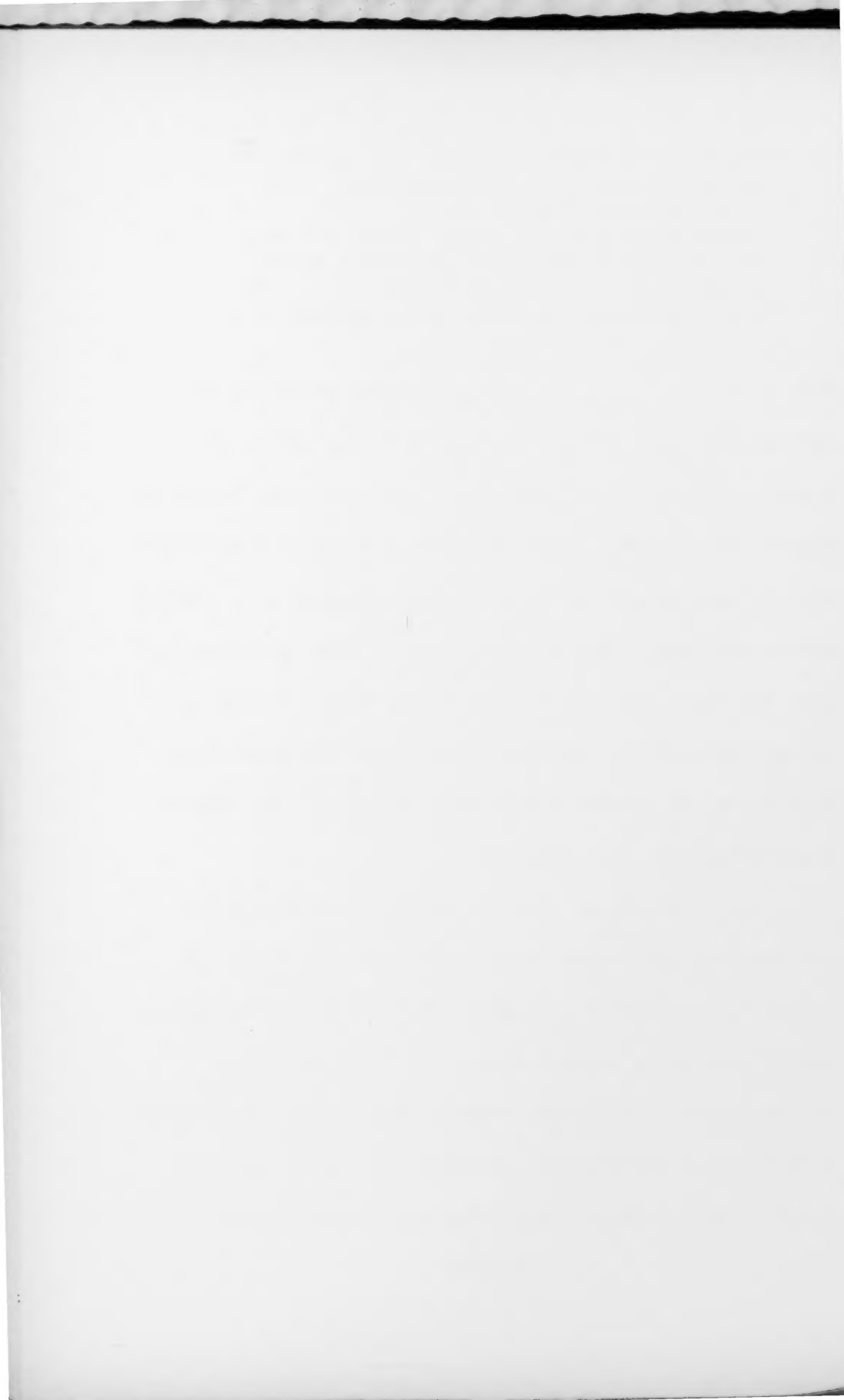


factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . .

..

The plea to find an undisclosed promise was denied by the trial judge, by the SJC, by a single justice of the SJC, and by the Federal district court. The record demonstrates that the trial court's finding was based on, among other things, the testimony of the prosecutor and Carden, whose credibility that court was in an eminently better position to evaluate. There is no doubt that the finding is "fairly supported by the record."

[2] Whether the prosecutor knowingly relied on perjured testimony in failing to correct Carden's alleged statement that there was a pending case, when in fact he (the prosecutor) believed there was none, presents a slightly different question. The Supreme Court has recognized "the well-established



rule that 'a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 3382, 87 L.Ed.2d 481 (1985) (quoting United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976)).

Even disregarding serious questions concerning the knowledge of the prosecutor, and whether this testimony was actually perjured, we need not reverse, since we find that the "false" testimony could not have affected the judgment of the jury. The appellants repeatedly state that pending charges could not be used to impeach Carden because of his twenty- to thirty-year sentence. If that is the case, then the jury would have even less reason to doubt Carden



on the basis of a case that had already been settled. The alleged perjury does not establish a crucial element of the case, but merely presents some evidence that Carden may have had some reason to expect help from the prosecutor in the future, without, however, a promise in that respect. We do not think the jury would have been significantly affected by this particular kernel of information.

[3] The more seriously impeaching news is the pendency of the motion to revise and revoke. Carden knew that such a motion had been filed on his behalf, and he may well have expected some cooperation from a grateful prosecutor, especially since Carden had already received some assistance. Petitioners urge us to impute knowledge of this motion to the prosecutor, in order to apply the more punitive standard for prosecutorial failure to disclose exculpatory evidence, rather than the stricter standard



for newly discovered evidence. Unfortunately petitioners provide us with no reason to impute this knowledge to Prescott, the prosecutor, other than the mere fact that Carden may have expected Prescott's help on the motion.

In fact, there is good reason not to charge Prescott with this knowledge. Appellants cannot claim that Prescott actually knew of the motion since the state court expressly, and reasonably, found no actual knowledge. We hesitate to impose on the prosecution the burden of discovering any action taken by any one of its witnesses that may bring into question the disinterested quality of that witness' testimony.

[4] Since the pendency of the motion is simply newly discovered evidence, therefore, petitioners must shoulder a heavy burden if they wish to establish that the Constitution demands they receive a new trial. We have



previously stated that "[i]t may be assumed that a compelling claim for relief might be presented when newly available evidence conclusively shows that a vital mistake had been made." Grace v. Butterworth, 586 F.2d 878, 880 (1st Cir. 1978). We review, of course, only for errors of constitutional magnitude. Subilosky v. Callahan, 689 F.2d 7, 9 (1st Cir. 1982), cert. denied 460 U.S. 1090, 103 S.Ct. 1788, 76 L.Ed.2d 356 (1983). "[T]he trial court, however, possesses a 'wide degree of discretion' and . . . the remedy is to be 'sparingly used'." Grace, 586 F.2d at 881 (quoting Sawyer v. Mullaney, 510 F.2d 1220, 1221 (1st Cir. 1975)). We cannot find that the trial court abused that discretion here. The jury chose to believe Carden despite the fact that it heard - albeit erroneously - that he had a pending case rather than a pending motion, and despite a plethora of evidence regarding his



bad character. New evidence of a pending motion alone, without any prosecutorial promise of assistance, is not so momentous as to make denial of a new trial a "vital mistake," or one of constitutional magnitude.

II.

[5] Whether sufficient evidence was adduced at trial to support Doherty's conviction is a more difficult question. The Supreme Court directs us, when hearing a challenge under 28 U.S.C. §2254 to a state court conviction, to grant the applicant habeas corpus relief "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-92, 61 L.Ed.2d 560 (1979). This standard must be applied, of course, with specific reference to the elements of the offense as defined by state law. Id. at



324, n. 16, 99 S.Ct. at 2792, n. 16.

Doherty was convicted of first degree murder, for aiding and abetting the principals in the crimes. "Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity and cruelty, . . . is murder in the first degree." Mass.Gen.L. ch. 265, §1. Malice aforethought includes the intent to commit great bodily harm as well as the intent to kill. Commonwealth v. Campbell, supra 393 N.E.2d at 825. Under Massachusetts law, one may be punished to the same extent as a principal if one "aids in commission of a felony." Mass.Gen.L. ch. 274, §2.

Doherty argues that there is a complete lack of evidence regarding his mental state, and urges us to reverse his conviction.¹

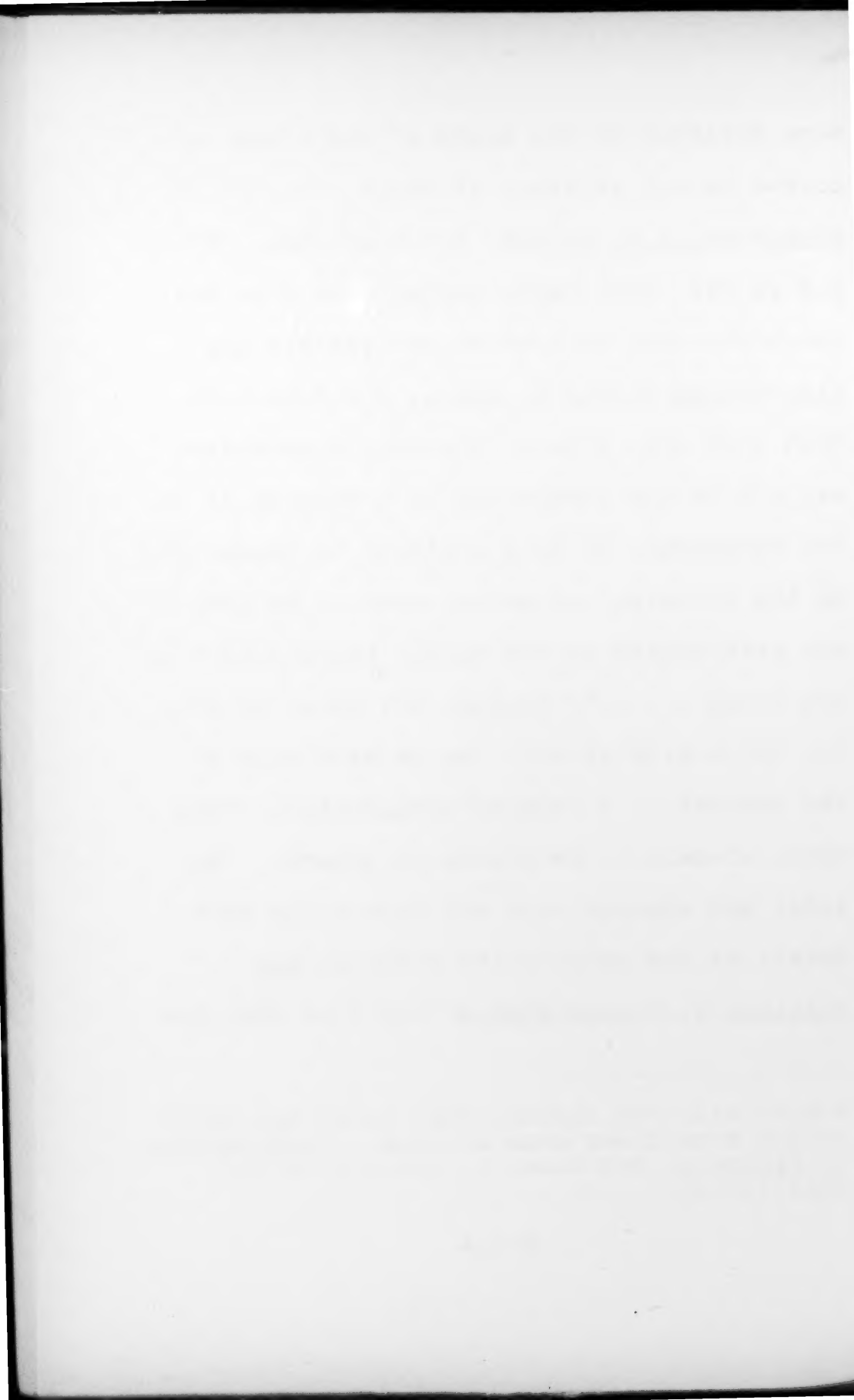
¹The absence of direct evidence of criminal intent is, of course, not fatal to the prosecutions' case. The jury may find an agreement implicit in Doherty's actions, Commonwealth v. Whitehead, 379 Mass. 640, 400



Mere presence at the scene of the crime, of course is not evidence of guilt.

Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, 507, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979); see also United States v. Campa, 679 F.2d 1006, 1010 (1st Cir. 1982). However, a defendant may aid in the commission of a felony if he, "by agreement, is in a position to render aid to the principal offender, even if he does not participate in the actual perpetration of the crime" Soares, 377 Mass. at 471-72, 387 N.E.2d at 507. As we have said in the context of a federal prosecution: "The vital element to be proven is intent. 'An aider and abettor need not know every last detail of the substantive offense, see Williams v. United States, 308 F.2d 664, 666

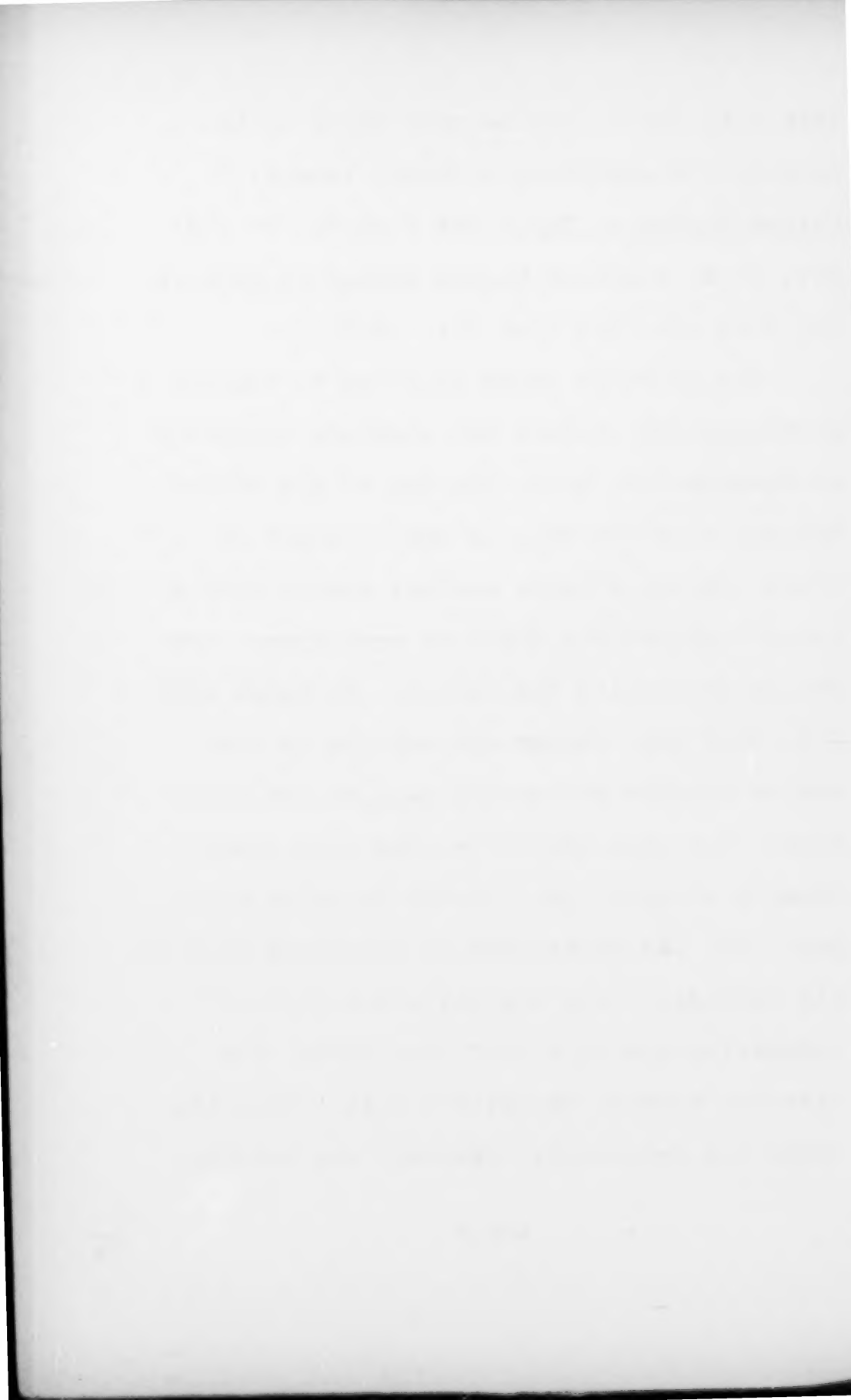
N.E.2d 821, 832 (1980), just as it may infer intent from those same actions. Commonwealth v. Ferguson, 365 Mass. 1, 309 N.E.2d 182, 1987 (1974).



(9th Cir. 1962), but he must share in the principal's essential criminal intent."

United States v. Tarr, 589 F.2d 55, 59 (1st Cir. 1978) (quoting United States v. Sanborn, 563 F.2d 488, 491 (1st Cir. 1977)).

The relevant facts relating to Doherty's participation concern two separate incidents on November 25, 1976, the day of the murder. The cells in MCI-Walpole are arranged in tiers, facing a large central shaft, with a catwalk around the shaft on each floor, and stairs connecting the floors. At about 5:00 P.M. that day, Carden was walking up the stairs towards Perrotta's cell on the third tier. But when Carden reached that tier, Doherty stopped him. Carden tried to walk past, but was restrained by Doherty's hand on his shoulder. All the while Doherty was addressing him in a very loud voice, and glancing towards Perrotta's cell. When the other two defendants, Campbell and Keigney,



walked out of the cell with Perrotta, Doherty abruptly ended the conversation and let Carden pass. Carden found Perrotta visibly agitated.

There is more than sufficient evidence to place the next incident (about two hours later) at the exact time of the murder. Carden had left the cell block and was returning to it, when, from the first floor, he saw Doherty leaning against the railing on the third floor, directly in front of Perrotta's cell. Carden hurried up the stairs, but by the time he reached the second tier he saw Doherty walking quickly away from the cell, and Campbell and Keigney walking out. When he reached the third floor and entered the cell he found Perrotta mutilated and strangled.

From the first incident, the jury could draw the following reasonably inferences. Campbell and Keigney were planning the murder



for 5:00 P.M. and posted Doherty as a lookout, because they knew Carden was Perrotta's friend and frequent visitor. In fact Perrotta had just come from Carden's cell, where he had spent the afternoon. From the limited information at our disposal it seems the jury could infer that Doherty's conversation with Carden was very unusual, and would not have taken place without an ulterior motive. This would make it highly suspicious in light of all the events of the day. The jury could also believe that Doherty was speaking loudly enough to warn the two principals was speaking loudly enough to warn the two principals to either postpone the crime or leave the scene due to Carden's imminent arrival.

From the second incident the jury could conclude that Doherty must have known Campbell and Keigney had killed Perrotta since he was standing directly in front of



the cell at the time it was done. It could also conclude that a warning from Doherty that Carden had entered the cell block was the cause of Campbell and Keigney's precipitous exit from the cell. Finally, it could infer from all the incidents of the day that Doherty was a participant in the plan to murder Perrotta, and would not have been made an eyewitness to the crime unless he shared in the intent to at least inflict some sort of great bodily injury upon Perrotta. Therefore, not only was Doherty clearly in a position to render assistance to Campbell and Keigney, but the jury could have reasonably inferred an agreement to be there, and that Doherty actually rendered some assistance in the form of a warning.

In addition to the deference reserved for the finder of fact in a habeas petition such as this one, we must bear in mind that the state courts have already considered the



sufficiency of the evidence. "A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts" Jackson v. Virginia, 443 U.S. at 323, 99 S.Ct. at 2791. We do not abdicate our responsibility to independently review the evidence, but in a close case - admittedly the evidence here is not overwhelming - we take some comfort in the knowledge that the Supreme Judicial Court of Massachusetts concurs in our estimation of the record. See Commonwealth v. Campbell, supra.

In conclusion, we find that there was no constitutional defect either in the prosecution's conduct with respect to the principal witness against petitioners or in the sufficiency of the evidence against petitioner Doherty.

The judgment of the district court is therefore affirmed.



UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1311

JOHN CAMPBELL, JR., ET AL.,
Petitioners, Appellants,

v.

MICHAEL V. FAIR, COMMISSIONER OF
CORRECTION, Respondent, Appellee.

JUDGMENT

Entered January 26, 1988

This cause came on to be heard on appeal from the United States District Court for the District Court Massachusetts, and was argued by counsel.

Upon consideration whereof. It is now here ordered, adjudged and decreed as follows: The Order of the district court is affirmed.

By the Court:
Francis P. Scigliano,
Clerk

[cc: Messrs. Cardinale and Gottlieb]

A-120

THE STATE OF NEW YORK
IN SENATE

January 10, 1907.

REPORT OF THE
COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE

PASSED MAY 1, 1896.

ALBANY:

THE STATE PRINTING OFFICE,

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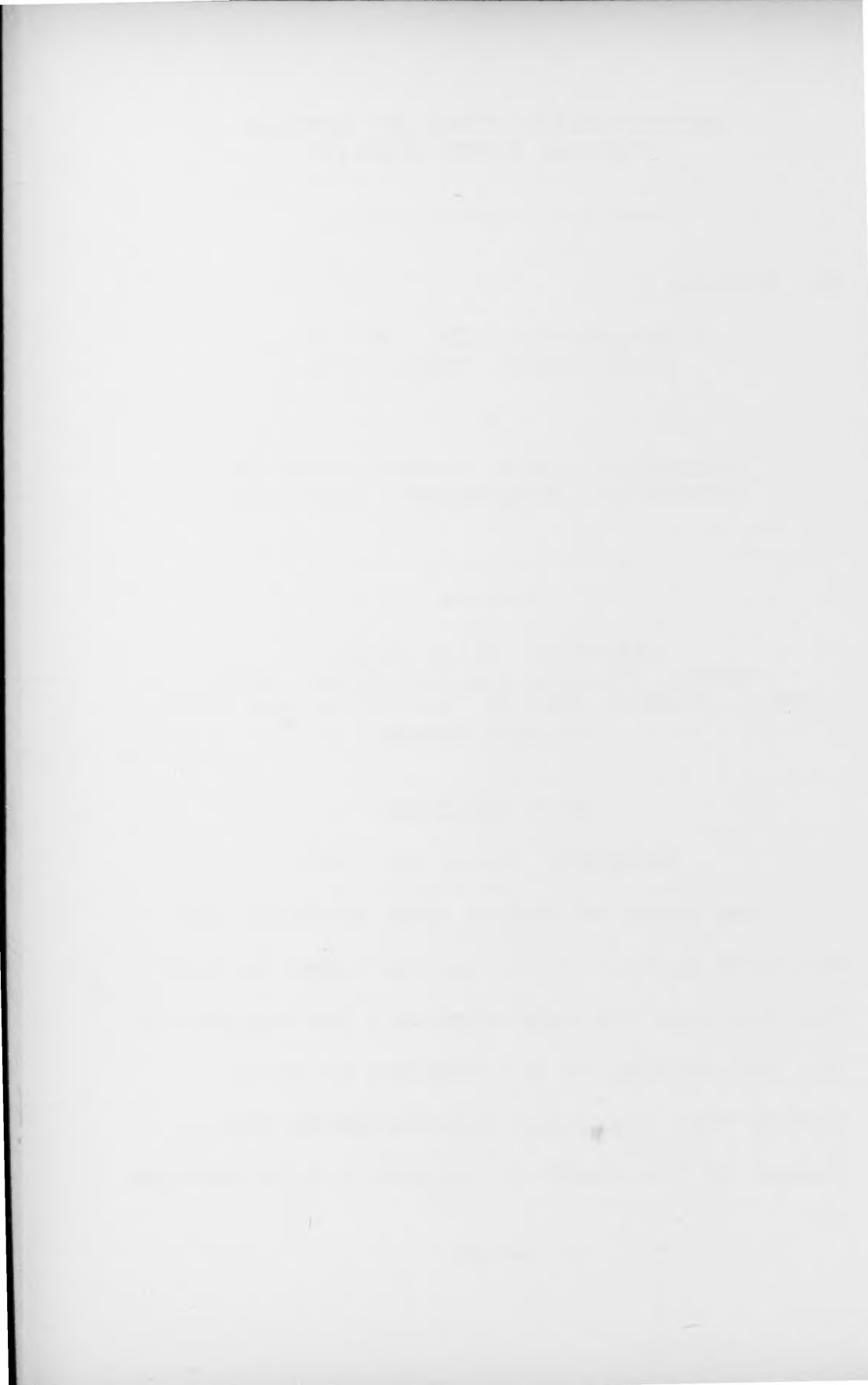
Before

CAMPBELL, Chief Judge,
BROWN, *Senior Circuit Judge, and
COFFIN, BOWNES, BREYER, TORRUELLA and SEYLA,
Circuit Judges

ORDER OF COURT

Entered: March 31, 1988

The panel of judges that rendered the decision in this case, having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc, having been carefully considered by the judges of the Court in regular active service



and a majority of said judges not having
voted to order that the appeal be heard or
reheard by the court en banc,

It is ordered that the petition for
rehearing and the suggestion for rehearing in
banc be and the same hereby are denied.

By the Court:

Francis P. Scigliano Clerk.

*Of the Fifth Circuit,
sitting by designation.

[cc: Messrs. Cardinale and Gottlieb]
[and West Publishing Company's Managing]
[Editor, James P. Corson]